INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

RIVERSIDE COFFEE, LLC

Riverside

v.

REPUBLIC OF NICARAGUA

Respondent

(ICSID Case No. ARB/21/16)

THE REPUBLIC OF NICARAGUA'S POST-HEARING SUBMISSION

October 25, 2024

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DEFINED TERMS AND ABBREVIATIONS

ANA	Nicaraguan National Water Authority (Autoridad Nacional del Agua)
APHIS	Animal and Plant Health Inspection Service
Castro I	Witness Statement of Marvin Antonio Castro Orozco **(RWS-02)**
Castro II	Second Witness Statement of Marvin Antonio Castro Orozco **(RWS-11)**
CD-01	Riverside's Opening Statement Demonstratives
CETREX	Nicaraguan Export Procedures Center (Centro de Trámites de las Exportaciones)
Claimant	Riverside Coffee, LLC
Counter Memorial	Respondent's Counter Memorial on Jurisdiction and the Merits of March 3, 2023
Credibility I	Credibility International Damages Expert Report (**RER-02**) – *now HKA*
Credibility II	Credibility International Damages Second Expert Report (**RER-04**) *now HKA*
DCF	Discount Cash Flow
Duarte I	Expert Report of Dr. Odilo Duarte (**RER-01**)
Duarte II	Second Expert Report of Dr. Odilo Duarte (**RER-03**)
Enríquez I	Witness Statement of Favio Darío Enríquez Gómez (**RWS-21**)
Ferrufino I	Witness Statement of Domingo Germán Ferrufino (**CWS-12**)
FET	Fair and Equitable Treatment
FMV	Fair Market Value
FPS	Full Protection and Security
García I	Witness Statement of Ramón García Guatemala (**RWS-20**)
Government	Government of the Republic of Nicaragua

Gutierrez I	Witness Statement of Luis Gutiérrez (**CWS-02**)
Gutierrez II	Second Witness Statement of Luis Gutiérrez (**CWS-10**)
Gutiérrez-Rizo I	Witness Statement of Diana Yuslibis Gutiérrez Rizo **(RWS-01)**
Gutiérrez-Rizo II	Second Witness Statement of Diana Yuslibis Gutiérrez Rizo **(RWS-010)**
Hacienda Santa Fé	Hacienda Santa Fé – El Pavón
Hearing	Hearing on Jurisdiction and Merits held from July 1 – 11, 2024
Henrriquez I	Witness Statement Jaime Henrriquez Cruz (**CWS-06**)
Herrera I	Witness Statement of William Ramón Herrera González **(RWS-03)**
Herrera II	Second Witness Statement of William Ramón Herrera González **(RWS-12)**
HSF	Hacienda Santa Fé
Huerta I	Witness Statement of Vidal de Jesús Huerta Gómez (**RWS-19**)
ILC	International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts
INAFOR	National Forestry Institute (Instituto Nacional Forestal)
Inagrosa	Inversiones Agropecuarias, S.A.
IPSA	Institute of Agricultural Protection and Health (Instituto de Protección y Sanidad Agropecuaria)
Kotecha I	Expert Valuation Statement of Vimal Kotecha (**CES-01**)
Kotecha II	Second Expert Valuation Statement of Vimal Kotecha (**CES-04**)
González I	Witness Statement of Norma del Socorro González Argüello (MARENA) **(RWS-09)**
González II	Second Witness Statement of Norma del Socorro González Argüello (MARENA) **(RWS-15)**
Lacayo I	Witness Statement of Rodolfo José Lacayo Ubau (ANA) **(RWS-07)**

Lacayo II	Second Witness Statement of Rodolfo José Lacayo Ubau (ANA) **(RWS-16)**
López I	Witness Statement of José Valentin López Blandón **(RWS-04)**
López II	Second Witness Statement of José Valentin López Blandón **(RWS-13)**
MAG	Nicaraguan Ministry of Agriculture (Ministerio de Agricultura de Nicaragua)
MAGFOR	Ministry of Agriculture and Forestry of Nicaragua (Ministerio Agropecuario y Forestal de Nicaragua)
MARENA	Ministry of the Environment and Natural Resources of Nicaragua (Ministerio del Ambiente y Recursos Naturales de Nicaragua)
Melvin Winger I	Witness Statement of Melvin Winger I (**CWS-04**)
Memorial	Claimant's Memorial of October 21, 2022
Mena I	Witness Statement of Xiomara Mena Rosales I (CETREX) **(RWS-06)**
Méndez I	Witness Statement of Álvaro Méndez Valdivia (INAFOR) **(RWS-08)**
Méndez II	Second Witness Statement of Álvaro Méndez Valdivia (INAFOR) **(RWS-17)**
MFN	Most-Favored Nation
Miller I	Witness Statement of Tom Miller I (**CWS-07**)
Mona Winger I	Witness Statement of Mona Winger I (**CWS-05**)
Moncada I	Witness Statement of Alcides René Moncada Casco (IPSA) **(RWS-005)**
Moncada II	Second Witness Statement of Alcides René Moncada Casco (IPSA) **(RWS-14)**
Nicaragua	Republic of Nicaragua
NT	National Treatment
Pfister I	Expert Statement of Carlos Pfister (**CES-03**)

PGR	Attorney General's Office of Nicaragua (Procuraduría General de la República de Nicaragua)
Police	National Police of Nicaragua
Renaldy Gutiérrez I	Expert Statement of Renaldy J. Gutiérrez, Esq. (**CES-06**)
Reply	Claimant's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction of November 3, 2023
Respondent	Republic of Nicaragua
RD-01	Nicaragua's Opening Statement Demonstratives
RFA	Claimant's Request for Arbitration of March 19, 2021
Riverside	Riverside Coffee, LLC
Rondón I	Witness Statement of Carlos Rondón (**CWS-01**)
Rondón II	Second Witness Statement of Carlos Rondón (**CWS-09**)
Rosales I	Witness Statement of Martín Agenor Rosales Mondragón (IPSA) (**RWS-18**)
Sequeira I	Legal Expert Report of Dr. Byron I. Sequeira Pérez (**RER-05**)
Treaty / DR-CAFTA	Dominican Republic-Central America Free Trade Agreement
USDA	U.S. Department of Agriculture
Welty I	Witness Statement of Russ Welty (**CWS-11**)
Winger de Rondón I	Witness Statement of Melva Jo Winger de Rondón I (**CWS-03**)
Winger de Rondón II	Second Witness Statement of Melva Jo Winger de Rondón I (**CWS-08**)
Wolfe I	Expert Statement of Prof. Justin Wolfe (**CES-02**)
Wolfe II	Second Expert Statement of Prof. Justin Wolfe (**CES-05**)
NIO or C$	Nicaraguan Córdobas

REFERENCES TO TRIBUNAL'S QUESTIONS

Question No. 1	Pages 69-70
Question No. 2	Pages 32-47
Question No. 3	Pages 52-54
Question No. 4	Pages 54-68

I. INTRODUCTION

1. The Hearing further confirmed that Riverside should never have brought this case. It sought hundreds of millions of dollars, alleging that Nicaragua sent armed "paramilitaries" to forcibly take Hacienda Santa Fé ("**HSF**"). When that story fell apart, Riverside pivoted to contending that Nicaragua should have used its military against its own citizens so that Riverside could turn avocados into riches. Even if that were what DR-CAFTA required—and it is nowhere close—Riverside's damages theories ignore multiple "elephants in the room," among them a complete lack of financing, the failure to export a single avocado, and a U.S. ban on Nicaraguan avocados. It is all too good to be true because it never was.

2. Riverside first alleged a traditional "direct" expropriation where "paramilitaries" (a term appearing hundreds of times in Riverside's Memorial and RFA) seized HSF "at the behest of Nicaragua to carry out the government's political objectives."[1] Accusing "Nicaragua's government (its police, its voluntary police, its elected officials, and others)" of "unlawfully seiz[ing] and fail[ing] to protect" its property, Riverside asked for "no less" than US$689,098,011 for the loss of its supposed avocado business.[2]

3. After Nicaragua refuted this narrative in its Counter-Memorial, Riverside's story changed: it now accuses Nicaragua of "judicially expropriating" its investment by establishing a protective regime over HSF to keep out the same invaders Riverside had previously accused Nicaragua of sending. Riverside simultaneously faults Nicaragua for not sending its military to drive illegal occupants from HSF by force—despite Nicaragua having successfully and peacefully resettled all of the illegal occupants.

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[1] Memorial, ¶¶10, 57-58; **Tr.**483:13-484:18.

[2] Memorial, ¶¶7, 45.

4. At the Hearing, Riverside tried to pursue both theories at once: its lead witness, Carlos Rondón, again accused Nicaragua of sending paramilitaries to confiscate HSF, while its counsel and legal expert faulted Nicaragua's response to the invasion.[3]

5. Nicaragua has never revised its factual account: this invasion was simply the most recent chapter of a decades-long property dispute between the Rondón family and the members of a local farming cooperative, *Cooperativa El Pavón*. As Nicaragua has explained all along, since 1990 this cooperative—comprised of former members of the Nicaraguan Resistance ("*Contras*")—claimed its members had been promised HSF as part of a settlement that provided land to fighters demobilized at the end of Nicaragua's civil war. These former *Contras* settled in the upper sector of HSF, known as *El Pavón*, from 1990 to 2004 with their families and lived as farmers until the Rondón family violently evicted them, as captured in the local newspaper:[4]

DEPARTAMENTALES

SÁBADO, 22 de noviembre de 2003 — EL NUEVO DIARIO — 11B

FRANCISCO MENDOZA S.

Santos Reyes Hernández, de 65 años, aseguró que está amenazado con ser desalojado este sábado de su ranchita construida con madera, teja, manila y plástico negro, si no sale por su voluntad.

FRANCISCO MENDOZA S.

Éste es el portón que la administración de la agropecuaria Inagrosa mandó a encadenar para no dejar pasar a los miembros de la cooperativa El Pavón, a pesar de que es una vía pública construida por el gobierno de Nicaragua.

FRANCISCO MENDOZA S.

Ésta era la vivienda del campesino Dionisio Rugama, la que fue derrumbada y quemada por los CPF y trabajadores de la Empresa Inagrosa.

600 campesinos, niños y ancianos, lanzados a la muerte

Tierra arrasada en El Pavón

Escenas evocan la guerra de Vietnam

propietarios de las mismas... mundo Gutiérrez, delegado... EL NUEVO DIARIO y... noviembre se desbarataba la...

[3] **Tr.** 32:13-33:16,488:9-21.

[4] *See* **R-0036-SPA**. The headline, found at **R-0036-ENG**, translates to "Scorched land in El *Pavón*."

6. Foreshadowing Riverside's position in this case about Hass avocados, the Rondón family asserted in the early 2000s that this eviction had been necessary because its local farming company Inversiones Agropecuarias, S.A. ("**Inagrosa**") was about to strike it rich by growing a "non-traditional crop" at HSF (leatherleaf ferns), with the inimitable financial backing of a U.S. investor (Riverside) and with the plan to export this crop to lucrative markets around the world.

7. Much like its Hass avocado project, the Rondón family's fern venture failed to germinate, and Riverside's subsequent coffee business wilted after an outbreak of Roya fungus. But the *El Pavón* community remained intent on returning to the land they considered rightfully theirs. In 2017, when HSF appeared to have been abandoned due to the failure of its coffee business, some of these people re-took *El Pavón*. And when civil strife engulfed Nicaragua in June 2018, they seized the opportunity to take all of HSF at gunpoint. Outnumbered and outgunned, Nicaraguan police managed to remove all of the invaders from the property peacefully in August 2018, but the invaders returned a few days later after Riverside and Inagrosa did nothing to secure their property. At that point, faced with the former *Contras*' warning they would "fight" to stay at HSF, Nicaragua established a commission to arrange for the peaceful resettlement of the *El Pavón* community. This feat was achieved by August 2021, without force or bloodshed. Since that time, Nicaragua continues to secure HSF, at its own expense, for Riverside's benefit. Meanwhile, Riverside continues refusing to resume possession of HSF.

8. Regardless of which version of events Riverside advances, its claims fail on their merits. Riverside has neither shown that Nicaragua ordered the invasion nor that Nicaragua took title over HSF. As to the latter, this record is replete with official property records, judicial

orders, and correspondences in which Nicaragua affirms that HSF has at all relevant times belonged to Inagrosa.

9. So Riverside devoted the bulk of the Hearing quibbling with Nicaragua's reaction to the invasion. However, the self-judging essential security clause at Article 21.2(b) of DR-CAFTA forecloses any claim related to Nicaragua's response to the occupation of HSF by armed former rebels. The recent award in *Seda v. Colombia*—unavailable at the time of Hearing—confirms Nicaragua's position that, when Article 21.2(b) is invoked in "good faith," any measures a Respondent State considers necessary for its essential security are "excluded from the scope of the [treaty's] coverage and [the] Tribunal's inquiry must stop."[5] Nicaragua's decision to permanently resettle the heavily armed invaders through peaceful negotiation rather than force is thus exempt from review.

10. Even without Article 21.2(b), Riverside's claims fail because the DR-CAFTA's full protection and security standard does not oblige a State to use the military against its own citizens to accommodate a private landowner. But that, fundamentally, is Riverside's case, as confirmed by Riverside's telling suggestion that Nicaragua should have utilized "the military if necessary" to remove the invaders.[6] Nicaragua's decision to peacefully resettle the invaders and their families complied with DR-CAFTA. The Tribunal should not second-guess Nicaragua's response to this volatile situation.

11. Implicitly recognizing the weakness of its case, Riverside tries to cast a measure meant to safeguard HSF as a "judicial expropriation." As this Tribunal already held, in 2021, because Riverside refused to resume possession of the HSF, Nicaragua obtained a temporary

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[5] *Angel Samuel Seda et al. v. The Republic of Colombia,* ICSID Case No. ARB/19/6, Award, June 27, 2024, ¶¶742-756, 795 (**RL-0219**).

[6] *See* Reply, ¶434; *see also id.* ¶1384.

Protective Order in its courts enabling it to secure the property at Nicaragua's cost. This Tribunal held that the Protective Order "cannot be characterized as a 'seizure order'; it rather constitutes a measure that is intended to protect the Claimant's property in Nicaragua, pending completion of the present proceedings."[7]

12. Nothing adduced at the Hearing suggests otherwise. Instead, Riverside quibbles about the notice it received for the Protective Order. But it is undisputed that Riverside learned about the December 2021 Protective Order no later than November 2022 (if not earlier). Since then, Riverside neither asked a Nicaraguan court to dissolve the order nor sought to resume possession of HSF. Indeed, when asked if he wanted HSF back, Mr. Rondón deferred to his counsel.[8] Similarly, Riverside's Nicaraguan law expert Renaldy Gutiérrez testified that he would not have sought to dissolve the Protective Order in Nicaraguan court but would instead wait up to ten years to sue for damages.[9] Similar priorities likely explain Riverside's pursuit of this pointless arbitration.

13. Riverside's shifting narratives underscore the unreliability of its witness evidence. Much of it was hearsay, while Riverside's star witness, Domingo Ferrufino, appears to have been induced to present potentially fabricated testimony this Tribunal ultimately excluded. It is clear that this Tribunal should approach all of Riverside's witness testimony with caution.

14. Riverside's case on damages is no less specious, with a herd of "elephants in the room" that bar recovery. Riverside initially demanded compensation of US$644,098,011—a sum equal to roughly 1% of Nicaragua's GDP. One would expect a claimant to present extensive

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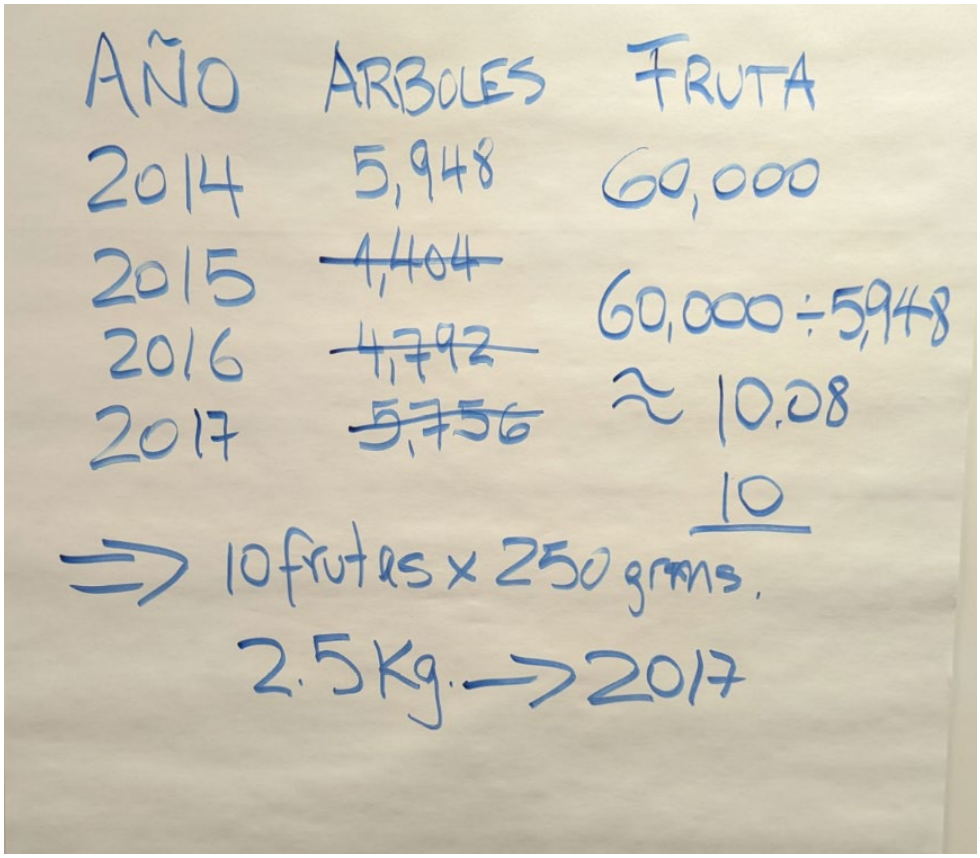
[7] PO4, ¶35.

[8] **Tr.**573:2-11.

[9] *See* **Tr.**1490:14-1492; *see also* **Tr.**1522:7-1523:3,1530:18-1531:3.

evidence in support of such a staggering claim. But Riverside and its damages expert relied exclusively on an unverifiable and unsourced letter from Mr. Rondón. Then, in its Reply, Riverside reduced its claim by nearly two-thirds to US$240,995,140.

15. Riverside's damages inputs are no more reliable: for example, Luis Gutiérrez (who had no prior experience with avocados) initially testified that Riverside expected yields of 20 kilograms per tree in the first year of production, before conceding that actual yields were at best 20% of that amount.[10]



[11]

[10] *See* **Tr.**837:7-13; *see also* **Tr.**838:12-24,840:12-846:8,906:16-907:15; Gutiérrez I, ¶174 (**CWS-02**).

[11] **RD-02**.

16. But there are other elephants too. Riverside could show no evidence that it would have been able to obtain a phytosanitary permit or any of the other permits needed to operate an avocado plantation, especially in a wildlife reserve.[12] And while Riverside has alleged that its avocado project would have realized profit margins of 1000%-3000% (compared to the 6-17.9% typical for the rest of the industry), Riverside's unpaid CFO Russ Welty admitted under cross-examination that Riverside had never managed to obtain any financing needed to get its avocado project off the ground.[13]

17. Three more "elephants" are even more fatal to Riverside's damages case. Neither Riverside nor Inagrosa had experience or know-how with respect to Hass avocado cultivation. In fact, their witnesses admitted their plan was to learn on the job. And this "business" never received financing, as confirmed by the Hearing testimony of Mrs. Melva Jo de Rondón (Riverside's designated representative in this case). Unsurprisingly, Inagrosa never sold ***any*** avocados. Riverside's investment thus cannot be valued as a going concern, let alone one worth hundreds of millions of dollars.

18. The last elephant is the Medfly (pictured below). Riverside's damages claims are largely predicated on the supposition that Inagrosa would have exported its Hass avocados to the U.S. In reality, however, the U.S. government has long banned Nicaraguan avocados to protect against this invasive species:[14] This ban remains in place today.[15] Indeed, in a tacit admission

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[12] *See* **Tr.**1613:9-1614:6. Riverside declined to call any of Nicaragua's five witnesses on permitting issues.

[13] *See* **Tr.**980:6-19:18; *see generally* Welty I, ¶44 (**CWS-11**); **Tr.**1970:21-1971:1.

[14] *See* Memorial, ¶361; Rondón I, ¶183 (**CWS-01**); Rosales I, ¶24 (**RWS-18**).

[15] *See generally* **Tr.**1846:17-1857:19. Nicaragua urges the Tribunal to consider carefully the reports of Dr. Odilo Duarte, the only avocado expert offered by either side.

that it is not entitled to damages for a lost avocado business, Riverside spent nearly all its cross-examination of Nicaragua's damages experts discussing land valuations.

[16]

19. This Post-Hearing Submission is organized as follows. ***First***, Nicaragua reviews what the record evidence establishes about the events at HSF, who the invaders were, and how Nicaragua responded to the invasion and ultimately resettled the invaders peacefully, with the property having been available for Riverside to resume undisputed secure possession for the last three years.

20. ***Second***, Nicaragua addresses the merits, including: why Riverside's claims are barred under DR-CAFTA Article 21.2(b), how Nicaragua's conduct was consistent with DR-CAFTA's FPS, FET, NT, and MFN obligations, and how there has never been an expropriation of property that undisputedly belongs to Riverside's Nicaraguan subsidiary.

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[16] Rejoinder, p.118.

21. ***Third and finally***, Nicaragua rebuts Riverside's baseless damages theories.

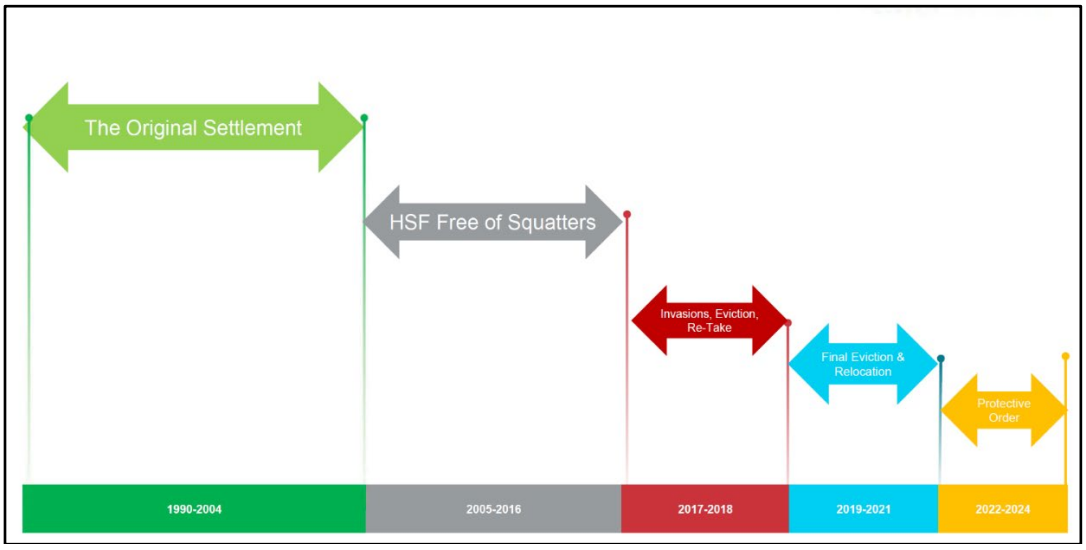
22. As instructed, this Post-Hearing Submission focuses on evidence presented at the Hearing and responds to the Tribunal's questions. To the extent issues are not addressed herein, Nicaragua relies on its prior oral and written submissions.

II. THE HSF INVASION

23. Contrary to Riverside's claims, the recent HSF invasion was part of an enduring property dispute between the Rondón Family and *Cooperativa El Pavón* over HSF. Nicaragua's response to that invasion—including the obtention of the "Protective Order"—was reasonable and, ultimately, successful.

24. As shown below, this property dispute began during the initial occupation of HSF in 1990 by demobilized former *Contras*. Although Mr. Rondón described this occupation as an "invasion" in contemporaneous correspondences, the evidence demonstrates the Rondón family allowed these individuals to live at HSF for nearly a decade before deciding to evict them in the early 2000s.

25. For ease of reference, Nicaragua defines the "first invasion" in this submission as the one beginning in 2017 and continuing through the police eviction on August 14, 2018. The "second invasion" is the one that begins on August 18, 2018 and remained through August 2021.[17]



[17] **RD-01** at 19.

A. The Decades-Long Property Dispute Between the Rondón Family and *Cooperativa El Pavón*

26. Claimant's original theory that the HSF invaders were government-sponsored "paramilitaries" collapsed at the Hearing. Unrebutted testimony and contemporaneous evidence confirmed that the invaders were in reality members of *Cooperativa El Pavón* who sought to take back land they had lived on in the early 2000s, before the Rondón family evicted them. The invasion was not a government measure but the latest chapter in a long-running dispute between the Rondón family and *Cooperativa El Pavón*.

1. The Prelude to the Dispute: *Contras* Relocate to HSF and Establish *Cooperativa El Pavón*

27. As Mr. López testified unrebutted, the dispute between *Cooperativa El Pavón* and the Rondón family began in 1990, in the aftermath of Nicaragua's decade-long civil war.[18] The then-Government sought to demobilize the *Resistencia Nicaragüense* members by offering them land to lay down their weapons.[19] The Government formed a commission whose task was, *inter alia*, to identify properties for this purpose.[20] One such property was HSF, where more than 1100 hectares appeared to be abandoned.[21]

28. Some demobilized, led by Adrián Wendel Mairena ("**Wama**") and including Mr. López, began living at HSF with their families while they waited to be granted title to HSF, which never came.[22] In uncontradicted testimony, Mr. López explained that Carlos Rondón Voysest (Carlos Rondón Molina's father) refused to sell HSF to the government. Mr. Rondón

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[18] **Tr.**1289:2-15.

[19] **Tr.**1289:2-15.

[20] Rejoinder, ¶96; Agreement of the Regional Agrarian Commission, November 22, 1990 (**R-0052**).

[21] *Id*.

[22] **Tr.**1315:2-11.

Voysest instead struck an "oral agreement" with the former *Contras*, allowing them to live informally on a 560-hectare tract known as "El Pavón."[23]

> Well, when they took us there initially, there was no one there. I got there, we were there for a time, then Mr. Carlos Rondón Voysest introduced himself and he spoke with us. We proposed to him that we should negotiate. The property had been assigned to us, so he came to agreement with us. We had an oral agreement that we should take a part of the upper part of the property which was abandoned, and we took that area then.

29. The historical record corroborates Mr. López's testimony: "in 1991, the Rondón family successfully evicted occupants from an area of approximately 1,096 *manzanas* and a fraction [*i.e.*, Santa Fé]" and that, "[a]s a result, the former Nicaraguan Resistance retained eight hundred manzanas [*i.e.*, El Pavón], an area where sixty-eight families settled, out of which there are currently forty-one living there, plus other thirty families that settled there later on":[24]

[23] **Tr.**1289:18-1290:1.

[24] Letter from Director of the Office of Rural Title Registration to Deputy Minister of Government of November 3, 2003 (**R-0177 Tab 39**); *see also* Lopez I, ¶ 12 (**RWS-04**).

30. The demobilized fighters and their families flourished at HSF, building houses, farming the land, and forming *Cooperativa El Pavón*.[25] Mr. López was voted its President and began asking the local government to give *El Cooperativa* title to its land.[26] The Rondón family, however, declined to sell it. Still, the community continued living at El Pavón, pursuant to the *modus vivendi* agreed with Mr. Voysest.[27]

31. Mr. Voysest died in 1997 and, with him, the oral agreement between the Rondón family and *Cooperativa El Pavón*.[28] As Mr. López testified: "things changed because…[Mr. Rondón Voysest's] children came [after his death] and they came in to change things."[29]

32. Mr. López testified that Mr. Rondón (the son) had his newly formed company, Inagrosa, purchase HSF in the late 1990s to cultivate ferns for export.[30] No one at Inagrosa had

[25] **Tr.**1290:2-6.

[26] Lopez II, ¶77 (**RWS-13**).

[27] **Tr.**1289:16-1291:4.

[28] **Tr.**1290:18-22.

[29] *Id*.

[30] **Tr.**1290:23-1291:4.

any experience cultivating or selling ferns, a "non-traditional crop" in Nicaragua.[31] Mr. Rondón nevertheless insisted that a U.S. investor (his in-laws, through Riverside) was ready to invest millions into this project,[32] so long as the Rondón family removed the squatters from HSF.[33] And that is how the property dispute between *Cooperativa El Pavón* and the Rondón family began.

2. The Rondón Family Evicts *Cooperativa El Pavón*

33. Mr. Rondón's testimony admits this account. In 1999, he filed "a case to get an eviction order to get these people out."[34] His family then began a letter-writing campaign, demanding assistance in evicting *Cooperativa* members from the U.S. Embassy, the Nicaraguan Ministry of Finance and Office of Title Registration, and the President of Nicaragua.[35] While acknowledging that the cooperative had lived at HSF since 1990, the letter described them as "invaders" trying "to take over our property," and insisted the situation required "immediate redress and a prompt resolution."[36]

34. Evicting hundreds of people, many who were demobilized fighters, and their families from a rural area covered with brush was not an easy task. In particular, the Government agencies then-mediating this property dispute hoped to relocate the individuals to another property prior to any evictions.[37] Otherwise, those evicted would likely return to HSF if they were simply left homeless. The agencies thus asked the Rondón family to delay having the police

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[31] **Tr.**1388:7-16

[32] **Tr.**507:1-21.

[33] **Tr.**508:17-509:1.

[34] **Tr.**497:6-10.

[35] **Tr.**493:12-517:10; Complete Rural Titling Office file for Coop. El Pavón and HSF (**R-0177 Tabs 8**, **9**, **25**, **27**).

[36] Complete Rural Titling Office file for Coop. El Pavón and HSF (**R-0177 Tab 8**).

[37] **Tr.**516:25-517:5.

enforce the Nicaraguan court's eviction order they had obtained until the residents of El Pavón could be relocated.[38]

35. These efforts were not immediately successful because there was no available public land in Jinotega and other regions lacked sufficient lands to house individuals without separating families.[39] As a result, relocation efforts carried on for several years.[40]

36. Progress occurred in October 2003. After a meeting with government officials, the squatters agreed to be relocated provided they were reimbursed for the crops they left behind at HSF.[41] That month, the Ministry of Treasury and Public Credit notified the Rondón family about this progress and instructed them to "discontinue all actions and proceedings against the members of the El Pavón Cooperative Association while the State of the Republic of Nicaragua deals with the situation."[42]

37. But the Rondóns were impatient. Disregarding the Nicaraguan Treasury's request, the Rondóns presented their eviction order to the police, leading to the forcible removal of all the residents of El Pavón over a two-month period.[43] The Rondón family then worked with the police to destroy the homes and other structures that the evicted individuals had left behind.[44]

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[38] Complete Rural Titling Office file for Coop. El Pavón and HSF (**R-0177 Tabs 13**, **14**, **34**).

[39] *Id*. (**R-0177** Tabs 42, 44).

[40] *Id*.

[41] Complete Rural Titling Office file for Coop. El Pavón and HSF (**R-0177 Tab 44**).

[42] Letter from the Ministry of Finance and Public Credit, Property Administration to the Rondón Molina family of Oct. 19, 2003 (**R-0061**).

[43] Complete Rural Titling Office file for Coop. El Pavón and HSF (**R-0177 Tabs 44**, **48**).

[44] *Id*.; **Tr.**1291:5-3.

The violent nature of this eviction was captured in a newspaper report from late 2003, which blamed the Rondón family.[45]

38. As Mr. López confirmed, the evictions at HSF inflamed the dispute between *Cooperativa El Pavón*.[46] The members of the cooperative felt humiliated by the manner of their eviction, particularly when the family's former patriarch had allowed them to stay.[47] Lacking anywhere else to go, many relocated to dwellings at the fringes of HSF. Mr. López, for example, moved to his childhood home, about one kilometer from El Pavón.[48] As he explained, many of the evictees who settled nearby believed they had a legal claim over El Pavón and were waiting for the opportunity to return.

39. That opportunity arose in 2017, when HSF appeared to have been abandoned.[49] The Roya fungus had wiped out HSF's coffee crops and the avocado experiment that Inagrosa had launched to save its business had failed. The Rondón family and other Inagrosa personnel returned to the U.S. and stopped visiting Nicaragua with regularity.[50]

40. The Cooperative could also see that HSF was abandoned because there was little to no activity at the Casa Hacienda, located just off the public road that cuts through HSF:[51]

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[45] Francisco Mendoza, *Scorched Land in El Pavón*, El Nuevo Diario of Nov. 22, 2003 (**R-0036**); **Tr.**1375:3-8. *See also supra* ¶ 5.

[46] Lopez II, ¶ 22 (**RWS-13**).

[47] Lopez II, ¶22 (**RWS-13**).

[48] *Id.*, ¶27; **Tr.**1374:1-5.

[49] **Tr.**1291:21-1292:5.

[50] **Tr.**670:6-11.

[51] **Tr.**1377:10-19,1356:7-12,1376:24-1377:5; Lopez I, p.4 (**RWS-04**).

The "X" denotes the Casa Hacienda, the red-and-white line denotes the public road. Inagrosa's avocado plantation, denoted with "X," planted between 2014-2016 was located near the Hacienda and within eyesight of that road. **Tr.**23:25-24:7.

41. In June 2017, Wama asked Mr. López to join him and dozens of other individuals to re-take El Pavón.[52] Although Mr. Lopez declined to participate, Wama and others entered the El Pavón sector of HSF and continued to live undetected at that location for nearly a year.[53] As the Rondón family's abandonment of HSF became readily apparent, more individuals followed this example, and the number of squatters at El Pavón increased.[54] Indeed, in a 2019 letter to Nicaraguan authorities, representatives of the cooperative indicated they had moved back onto HSF sometime in 2017, and has since had been living at El Pavón "for two years."[55] To justify their actions, the Cooperative leaders wrote to the government in early June 2018 to renew their longstanding demand for title to HSF.[56]

42. The documentary evidence confirms Mr. López's testimony that Inagrosa had abandoned HSF by 2017.[57] Claimant's records show that only a handful of workers, most of them security guards, remained at HSF. They were based near the Casa Hacienda, far from the El Pavón sector and across several intervening kilometers of heavily forested terrain.[58]

43. It was not until June 16, 2018, that HSF's guards spotted invaders breaking into the Casa Hacienda itself.[59] This is where Claimant's allegations about the illegal invasion and occupation of HSF begin.

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[52] **Tr.**1291:16-1292:8.

[53] **Tr.**1292:8-16.

[54] Lopez II, ¶¶34-35 (**RWS-13**).

[55] **Tr.**1378:18-1379:9; Letter from occupiers to Jinotega's Attorney General Office, Oct. 28, 2019 (**R-0094**).

[56] **Tr.**1361:4-7.

[57] Rejoinder, ¶23.

[58] **Tr.**1362:8-11.

[59] López II, ¶36 (**RWS-13**).

B. Claimant's Counternarrative Imploded at the Hearing

44. At the Hearing, Claimant offered zero evidence to support its counternarrative that government paramilitaries took HSF.[60] In its Opening, Claimant mentioned "paramilitaries" only three times.[61] Claimant's witnesses continued to pay lip service that HSF had been invaded by "paramilitaries," but when pressed those witnesses consistently admitted that their testimony was based on hearsay and that they had no ability to confirm those facts.[62]

45. Instead, the Hearing testimony from Claimant confirmed that HSF was invaded by *Cooperativa* members. Mr. Rondón confirmed the gist of 1990s-early 2000s dispute with the *Cooperativa* set forth above.[63] And while Mr. Rondón insisted he still believed the invaders were paramilitaries, he admitted that he was not present for that invasion; instead, Mr. Rondón's beliefs were based on what he heard from his employees, who, in turn, heard it from the security guards, who, in turn, supposedly heard it from the invaders—extremely unreliable triple hearsay.[64]

46. Luis Gutiérrez, who was present for parts of the invasion, confirmed that some of the invaders "referred to the upper part of the Hacienda as El Pavón"[65] and made references to a cooperative of the same name.[66] That testimony only makes sense if the invaders were members of *Cooperativa El Pavón*, as does testimony from Messrs. Luis Gutiérrez, Rondón, and others

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[60] Riverside incorporates its prior submissions regarding attribution.

[61] **Tr.**39:18,39:4,74:17.

[62] **Tr.**490:7-9; 391:17-21,716:9-25.

[63] **Tr.**490:21-491:12.

[64] **Tr.**548:25-549:23.

[65] **Tr.**720:15-19.

[66] **Tr.**720:20-22.

that the invaders were led by "Wama," the demobilized revolutionary who lived on El Pavón from 1990 to 2004 with other cooperative members.[67]

47. Nevertheless, Luis Gutiérrez maintained that the invaders were government agents, mainly based on a conversation he claims he had with Favio Dario Enriquez Gomez in 2018 near HSF. Specifically, Luis Gutiérrez alleges that Mr. Enriquez, who works for the Government, told him (at a barricade during the protests) that Nicaragua had ordered the invasion.[68]

48. Mr. Enriquez refuted that account during his testimony. Mr. Enriquez testified that: (i) he had no personal knowledge of the invasion; (ii) he remembered seeing Luis Gutiérrez at that barricade but the two never spoke because the area was dangerous; and (iii) Luis Gutiérrez's account of this alleged exchange is filled with errors, such as Luis Gutiérrez's inability to recall Mr. Enriquez's name correctly.[69]

49. The same is true with respect to the Hearing testimony of Domingo Ferrufino, who repeatedly stated at the Hearing that he cannot remember basic facts about the HSF invasion because of brain injuries he sustained during the invasion (a fact not included in his now-stricken witness statement).[70] Mr. Ferrufino insisted he remembered the invaders saying they were sent by the Government to invade HSF during his assault.[71] But Mr. Ferrufino could not explain why he did not memorialize that extraordinary fact in his account of the invasion given to a public

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[67] **Tr.**571:12-18; Gutiérrez II, ¶¶48-49 (**CWS-10**).

[68] **Tr.**687:9-23.

[69] **Tr.**1417:3-17; Enríquez, ¶4 (**RWS-21**).

[70] **Tr.**364:25-365:15,411:4-11,418:9-11.

[71] **Tr.**355:17-25.

notary in August 2018.[72] When pressed about this discrepancy, Mr. Ferrufino suggested that his brain injuries caused him to forget that fact when he gave his original account of the invasion but that he remembered this fact after speaking with Claimant's lawyers years later—the same lawyers who omitted to tell the Tribunal and Nicaragua that Mr. Ferrufino could not read.[73] None of this is credible.

50. In a desperate attempt to keep its counternarrative alive, Claimant presented, after the Hearing, a newspaper article and other documents that report a forest nursery in Nicaragua was named by a Government agency after an "Antonio Rizo" in 2021.[74] Claimant attempts to cast this as evidence of Nicaragua's involvement in the invasion, because Antonio Rizo was the given name of "Comandante Toño Loco," one of the invaders of HSF.[75] Beyond the inferential leap that naming a nursery is not proof of a Government-backed invasion, Nicaragua has already debunked this conspiracy theory.[76] To summarize, there is no proof that the nursery at issue was even at HSF or that the Antonio Rizo at issue is "Toño Loco," with none of the documents ever mentioning his widely-known pseudonym. Regardless, the allegation is nonsensical, insofar as Claimant wants the Tribunal to believe the Government honored Toño Loco after national police killed him during a 2018 shootout.[77]

51. Rather than engage in conspiracy theories, the best evidence of who invaded HSF is in the invaders' contemporaneous letters to government officials. Each of these letters

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[72] **Tr.**391:17-392:7.

[73] **Tr.**393:19-394:2,431:17-432:12.

[74] Riverside's Application for Leave to Introduce New Evidence of July 9, 2024.

[75] *Id.*

[76] Nicaragua's Observation on Claimant's New Evidence of July 22, 2024.

[77] *Id.*, ¶¶14-21.

references the property dispute with the Rondón family, recites that the invaders are members of *Cooperativa El Pavón* who had lived at HSF, and asks for legal recognition of their claimed right to live there—all of which would be nonsensical if Nicaragua had already ordered them to expropriate HSF.[78]

C. Nicaragua's Response to the Invasion Was Reasonable

52. Unable to attribute the illegal invasion of HSF to Nicaragua, Claimant devoted much of the Hearing to contending that Nicaragua failed to act reasonably in response to the invasion. This too is wrong.

53. Indeed, it is undisputed that Nicaragua removed all invaders from HSF by August 13, 2018, ***less than two months after the invasion began***—a fact memorialized in an August 14 inventory (after the first invasion) signed by Luis Gutiérrez and Sub-Commissioner Herrera (the former Police Captain for San Rafael del Norte) at the conclusion of the first HSF invasion.[79]

54. But Claimant and Inagrosa did nothing to secure the property and, predictably, the invaders immediately returned because the fundamental challenge of relocating the *Cooperativa* members had not been resolved. Nicaragua eventually resolved the issue peacefully, as it had tried in the early 2000s before that process was short-circuited by Mr. Rondón.

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[78] Letter from the *El Pavón* Cooperative to the Jinotega Attorney General's Office of June 5, 2018 (**R-0064**); Letter from Wendel Blandon Attorney General of the Republic of June 25, 2018 (**R-00196**).

[79] Inventory of damages at HSF of Aug. 14, 2018 (**C-0058**).

1. The First Invasion (Through August 18, 2018)

55. Throughout this case, Claimant has contended Nicaragua should have responded to the invasion with force immediately after becoming aware of it around June 16, 2018. While Nicaragua explains below (in Section §II.C.) why this position is legally foreclosed, Claimant's position is also factually baseless. The Hearing confirmed what Claimant has attempted to ignore in this arbitration: Nicaragua could not evict the invaders—former *Contras* who were heavily armed—especially at a time of unprecedented civil strife across the country.

56. These invaders were not typical trespassers; they were more than 500 individuals led by former *Contras* who knew how to fight in areas like those found at HSF. No one knew this better than Sub-Commissioner Herrera, responsible for the eight officers in San Rafael del Norte, who testified he fought against many of the invaders during the revolutionary war:[80]

> All of the former members of the Nicaraguan resistance [were] going to [be] there, and they do have war experience…because all of those individuals that were the leaders, clearly those individuals participated in the war in Nicaragua in the '80s, and they were dangerous…and I'm saying they were dangerous because I was also a member of the military during that time.[81]

57. Sub-Commissioner Herrera also testified it was critical to send Inspector Calixto Vargas to HSF as soon as possible to confiscate any weapons from the guards, because Herrera knew how "dangerous" the invaders could be and would overpower the guards and even the police:

> So, upon arriving to the Hacienda, the guards there would be in danger, and even my own police officers. So the idea was to avoid bloodshed that would bring very serious consequences for the works and also the police officers that I would be sending at that moment.[82]

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[80] **Tr.**1256:16-1257:7.

[81] *Id*.

[82] **Tr.**1257:8:14.

58. While the firepower of the former *Contras* alone justifies Nicaragua's response to de-escalate, all of that was exacerbated by situation in the country and San Rafael del Norte. Commissioner Marvin Castro contextualized this setting at the Hearing as follows:

> [A]s from 18 April 2018, a situation unfolded in which the opposition took initiative, and there were any number of violent acts aimed at destabilizing the country. The roads were obstructed, all of the highways. There was looting. Fires were set in supermarkets, stores, public buildings, mayors' offices, offices of the State including… police units were attacked by all the people who were wanting to overthrow the government by violent means.[83]

Indeed, Claimant does not and cannot deny that this civil strife existed in Nicaragua at that time.

59. Locally the police had just eight officers and a few vehicles; not enough resources to deal with the terrain (observable from the Opening drone video[84] and testimony from Sub-Commissioner Herrera).[85]

60. Nor could the San Rafael del Norte police rely on assistance from other police stations because of the *tranques* (roadblocks built by protestors in major motorways to attack the police and block transportation) that existed throughout Nicaragua during the protests.[86] The *tranques* had their intended effect in San Rafael del Norte. Sub-Commissioner Castro stated that "the main roadway to San Rafael del Norte, to Jinotega and to the municipalities were subject to roadblock,"[87] with those *tranques* becoming dangerous obstacles to traverse because they housed "armed individuals with shotguns, with [AK-47s], with pistols and other weapons" that were routinely used against the police.[88] Similarly, Commissioner Castro explained that he personally

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[83] **Tr.**1222:20-1223:9.

[84] Drone Video, March 7, 2024 (5:25-6:00) (**R-0231**).

[85] **Tr.**1232:18-24; Herrera II, ¶11 (**RWS-12**).

[86] **Tr.**1232:18-24.

[87] **Tr.**1232:15-17.

[88] **Tr.**1232:21-22.

knew that protestors had attacked police in *tranques* in and around San Rafael del Norte in bloody affairs that involved mortars and Molotov cocktails.[89] He also explained that "most of the roadblocks were put up…in the urban center[s]" and in "different sections of the highway" that traversed the municipalities of Jinotega, making it impossible for his other police units throughout the Department to travel to San Rafael del Norte during the period of civil strife.[90]

61. In light of the above, the police were under orders from the Nicaraguan President to remain in their barracks, so sending police to HSF was impossible in June-July 2018.[91] As Commissioner Castro and Sub-Commissioner Herrera explained, this order prevented them from executing basic police functions, such as using force to remove trespassers.[92]

62. Despite the evidence presented during the arbitration,[93] Claimant suggested this order never happened because it was not in writing, but Nicaragua's witnesses confirmed it was made during a live television broadcast prior to June (and remained in effect throughout July).[94] Claimant also suggested Inspector Vargas's visit to HSF in June 2018 to confiscate the guards' weapons was proof this order never existed, but Commissioner Castro explained the police could leave their barracks and would still "be able to address some things" so long as it aligned with the objective of the order, which was to reduce violence in the country.[95] Confiscating weapons at HSF to avoid escalation by former revolutionaries was consistent with that mandate.

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[89] **Tr.**1204:2-5.

[90] **Tr.**1225:16-1226:1.

[91] **Tr.**1239:23-25.

[92] **Tr.**1247:24-1248:4.

[93] Rejoinder, ¶123.

[94] **Tr.**1071:5-1072:25

[95] **Tr.**1223:10-16.

63. Claimant's retorts border on the absurd. Claimant stated at the Opening that Inspector Vargas should have climbed to El Pavón and arrested all 500 invaders by himself, a veritable suicide mission.[96] Mr. Rondón testified that he was disappointed the police confiscated the security guards' weapons because he expected the guards to use those weapons in defense of his avocado plantations.[97] Claimant's lamentations about the lack of firefights prove too much. As Sub-Commissioner Castro testified, the police's orders were to deescalate violence.[98]

64. Once the shelter order was lifted, in late July 2018,[99] Nicaragua took immediate steps peacefully to evict the invaders at HSF.

65. In August, Nicaragua's Attorney General's Office sent an email noting there had been invasions of private properties during the protests, which it would address immediately.[100] As Ms. Diana Gutiérrez testified:

> [T]he purpose of the email is zero tolerance for takeovers of land. Illegal invasions were not going to be allowed. Also to provide accompaniment to the landowners in their complaints or accusations and not to have a negative impact on the business climate and juridical security in our country.[101]

66. On August 9, 2018, Nicaragua sent summonses to the individuals who caused the HSF invasion. Commissioner Castro stated that his team met with these individuals on August 11, with the police ordering these individuals to leave HSF immediately.[102]

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[96] **Tr.**24:20-26:6.

[97] **Tr.**657:14-8.

[98] **Tr.**1223:10-16.

[99] **Tr.**1243:6-8.

[100] Email from PGR to PGR's local branches of Aug. 4, 2018 (**R-0223**); **Tr.**1149:26-1150:5.

[101] **Tr.**1149:25-1150:5.

[102] **Tr.**1207:5-22.

67. All the invaders accordingly left the premises on or by August 13, 2018 and Inagrosa regained control of HSF on August 14, 2018.[103]

68. After the eviction, however, Claimant and Inagrosa took no additional measures to protect their property. As Mr. Rondón admitted, after August 14, Inagrosa did nothing to secure HSF, such as (i) hiring more guards; (ii) installing security cameras; (iii) requesting police support; or (iv) asking Riverside for investments to protect the property.[104] Instead, Mr. Rondón ordered his overmatched five-member security team to return to HSF and continue with business as usual, despite knowing that there were hundreds of potentially armed individuals encircling HSF, who believed they had a right to live on that property.[105]

69. Unfortunately, in the absence of a relocation solution, the invaders returned to the land. Thus, by August 18, 2018, the invaders returned to HSF. Thereupon, Inagrosa staff fled the property and left Nicaragua to deal with the situation.[106]

2. August 18, 2018 – August 2021: Nicaragua Relocates All Invaders Without Violence

70. As these events showed, a permanent solution to the dispute over HSF required a place for the *El Pavón* community to live. Otherwise, they would always try to return.[107]

71. The Government thus took a different tack: negotiation and relocation.[108] As Ms. Gutiérrez testified: "We had to do this by a dialogue and not in the way that this happened in

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[103] **Tr.**566:2-25,1104:25-1105:5. Inagrosa contemporaneously confirmed that this eviction occurred via its execution of an inventory document dated August 14, 2018, found at **C-0348**. Similarly, Claimant's belated quibbles over whether the police did a thorough search of an 1100-hectare wooded property to make sure that every invader was evicted are specious. *See* **Tr.**28:4-21. Inagrosa never complained about the thoroughness of the eviction at the time and its administrator signed the inventory document.

[104] **Tr.**569:10-570:14.

[105] **Tr.**566:1-569:9.

[106] **Tr.**569:3-9.

[107] **Tr.**736:4-737:14.

2003 or 2004," when the Rondón family jumped the gun by evicting the squatters from HSF before the Government could relocate them.[109] This process required Nicaragua to negotiate with the invaders to convince them to leave HSF and continue their lives elsewhere, a tedious process that Ms. Gutiérrez detailed at the Hearing.[110] Photographs show these efforts:[111]

[108] **Tr.**1228:6-25.

[109] **Tr.**1125:15-19.

[110] **Tr.**1151:22-1154:8.

[111] Gutiérrez-Rizo I, ¶¶74,76 (**RWS-01**).

72. While time-consuming, this process worked. Over the ensuing three-year period, Nicaragua successfully relocated the members of the El Pavón community in stages. By August 2021, HSF was finally and permanently clear of illegal occupants.[112]

D. There Was No Judicial Expropriation

73. The record is clear: neither Inagrosa nor Riverside wanted to resume possession of HSF, because both have refused to accept Nicaragua's repeated and standing invitation to reenter the property that was first made on September 9, 2021.[113]

74. Claimant insists that Inagrosa never accepted that invitation because it was a ruse. But Claimant has never explained the ruse (or how it could be pulled off before this Tribunal). After the Hearing, the reality should be clear: Claimant prefers litigation to cultivation. This led to some discordant testimony. For example, Carlos Rondón described HSF as a "promised land" with a "unique microclimate" suitable for cultivation of lucrative crops.[114] But when repeatedly asked if his entities would resume possession of the property, he deferred that question to counsel.[115] And Claimant's legal expert, Dr. Renaldy Gutiérrez, said he would advise Inagrosa to wait ***up to ten years*** before deciding whether to return to HSF.[116]

75. The Hearing also confirmed the frivolity of Claimant's position that the Protective Order Nicaragua obtained over HSF resulted in a "judicial seizure," a position already rejected by the Tribunal in Procedural Order No. 4.[117]

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[112] **Tr.**1151:22-1154:8.

[113] Letter from Foley Hoag LLP to Appleton (**C-0116**); **Tr.**187:4-10,1753:23-1755:4. Afterwards, Riverside rejected all of Nicaragua's invitations to resume possession of the property.

[114] **Tr.**475:19-23.

[115] **Tr.**573:2-11.

[116] **Tr.**1530:18-1531:14.

[117] PO4, ¶35.

76. At the Hearing, Ms. Gutiérrez testified that her office applied for this Order so that Nicaragua could secure and protect HSF through the pendency of this arbitration.[118] As she explained, the Order became necessary because Claimant and Inagrosa would not resume possession of HSF.[119]

77. Relying entirely on Renaldy Gutiérrez's testimony, Claimant insists the Protective Order resulted in Nicaragua obtaining title over HSF.[120] Dr. Gutiérrez, however, conceded that he has not practiced law in Nicaragua for decades and has never advised any client with respect to judicial depositaries under Nicaraguan law.[121] In fact, Dr. Gutiérrez had difficulty reading documents in Spanish at his cross-examination, often requesting the examining attorney to refer him to an English-language translation of Nicaraguan legal documents.[122]

78. Although he admitted that nothing in the Order conveys title over HSF to Nicaragua,[123] Dr. Gutiérrez maintained that the property certificates issued after the Order demonstrate that title was transferred to Nicaragua.[124] Dr. Sequeira, who actually practices law in Nicaragua and has experience interpreting Spanish-language Nicaraguan legal documents, debunked this theory.[125] He analyzed each of the certificates in question and confirmed that they all categorically provide that Inagrosa remains the "100%" owner of HSF and any references in

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[118] **Tr.**1099:21-1100:9,1087:13-20.

[119] **Tr.**1086:9-16,1093:15-23.

[120] **Tr.**1426:8-1427:1.

[121] **Tr.**1535:16-1536:25.

[122] **Tr.**1446:14-20.

[123] **Tr.**1544:24-1546:25.

[124] **Tr.**1426:8-1427:1.

[125] **Tr.**1664:24-1666:11.

the certificates to Nicaragua merely provide it is a party to the arbitration in connection with which the provisional measure was issued:[126]

> Nowhere in the text of the order is the Registrar of Property ordered to make any modification to the title or ownership of INAGROSA in this case, nor is it ordered that there be any conveyance, modification or extinction of any right. The order doesn't say so.[127]

79. Dr. Sequeira also noted the provisions of the Nicaraguan procedural code, which unambiguously provide that judicial depositaries are temporary custodians of an asset and cannot dispose of or use that asset in any way that would cause it harm.[128]

80. Claimant persists that a "judicial seizure" occurred because of alleged service defects.[129] But Dr. Gutiérrez admitted that *ex parte* applications for provisional measures are appropriate in urgent situations, such as the one here.[130] He nevertheless claimed that Nicaragua wanted to expropriate HSF because it waited several months to give Inagrosa notice of the Order (which, he contended, was a due process breach).[131] But Dr. Gutiérrez could not identify any evidence that Nicaragua has benefited from its role as depository. To the contrary, Ms. Diana Gutiérrez testified that Nicaragua has incurred ***more than US$800,000*** trying to protect it.[132] In any case, it was clear that Claimant at all times had a remedy available to challenge what it

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[126] **Tr.**1667:7-1670:23.

[127] **Tr.**1665:25-1666:4.

[128] **Tr.**1670:24-1672:2.

[129] **Tr.**63:16-23; Reply, ¶¶178-182.

[130] **Tr.**1528:8-13.

[131] **Tr.**1425:1-1426:7.

[132] **Tr.**1099:23-1100:9.

considered to be a procedural defect and an alleged expropriation that was demonstrated it never occurred.[133]

81. Nor could Dr. Gutiérrez identify harm suffered by Inagrosa. Instead, he testified that he would advise Inagrosa to abstain from challenging the Protective Order at this time and to wait up to ten years to see if legal action should even be taken.[134]

82. Moreover, Dr. Gutiérrez's theory is also irreconcilable with Nicaragua's repeated correspondence asking Claimant and Inagrosa to resume possession of HSF.[135]

III. NICARAGUA'S GOOD FAITH INVOCATION OF ARTICLE 21.2(B)'S SELF-JUDGING ESSENTIAL SECURITY CLAUSE IS A COMPLETE DEFENSE TO LIABILITY UNDER DR-CAFTA

83. Riverside's claims fail because Nicaragua has invoked the self-judging essential security interest clause ("**ESI Clause**") at Article 21.2 of DR-CAFTA in good faith with respect to all measures taken in response to the unlawful invasion of HSF by hundreds of armed private citizens led by former *Contra* fighters.

84. Nicaragua's good faith invocation of Article 21.2(b) is conclusive. Indeed, while this section is offered in response to **Tribunal's Question No. 2**, it is not the Tribunal's role to make an independent determination of whether Article 21.2(b) applies because Article 21.2(b) of DR-CAFTA is self-judging by design. Nicaragua's good-faith invocation of Article 21.2(b) is therefore "the end of the matter" and a complete defense to liability under the DR-CAFTA.

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[133] **Tr.**1790:12-1791:4.

[134] **Tr.**1530:18-1531:14.

[135] Nicaragua's first letter asking Claimant to resume possession of HSF was dated September 9. 2021 (**C-0116**), the second December 12, 2022 (**R-0222**), the third April 3, 2023 (**C-0429**), the fourth January 19, 2024 (**R-0219**), and the fifth March 2, 2024 (**R-0234**).

85. The recently published award in *Seda v. Colombia*, interpreting and applying an identical ESI Clause in the U.S.-Colombia TPA ("**TPA**"), supports Nicaragua's defense. This award, which mirrors Nicaragua's prior submissions and the uncontroverted expert report of Professor Burke-White, is highly persuasive as to the interpretation and application of Article 21.2(b) here.

A. Article 21.2(b) Is Expressly Self-Judging, as the *Seda* Tribunal Recognized in Interpreting an Identical Provision

86. Article 21.2(b) in relevant part provides: "***[n]othing in this Agreement*** shall be construed…to preclude a Party from applying measures ***that it considers*** necessary for…the protection of ***its own*** essential security interests."[136] This unambiguous language leaves no doubt that it is exclusively for a DR-CAFTA State party itself to determine when this Clause applies. The lack of introductory or "limitative qualifying clauses"[137] accompanying the phrase "that it considers necessary" gives "clear indications [that] the text of the treaty…is self-judging."[138] The Tribunal's inquiry could stop here.

87. The *Seda* award confirms this. There, the claimants challenged the loss of their investment through a Colombian asset forfeiture related to connections to drug cartels. In its defense, Colombia invoked Article 22.2(b) of the TPA, which is identical to that of DR-CAFTA Article 21.2(b). Colombia argued that its measures had been necessary "to fight against organized crime, money laundering and drug trafficking…that have been ravaging the country

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[136] DR-CAFTA, Art. 21.2(b) (**CL-0001**).

[137] *Russia – Measures Concerning Traffic in Transit*, ¶¶7.62-7.65 (**WBW-018**).

[138] *Deutsche Telekom v. India*, PCA Case No. 2014-10, Interim Award, December 13, 2017, ¶231 (**RL-0211**).

for years."[139] Colombia further argued the ESI Clause was self-judging and a complete defense to liability.[140]

88. The *Seda* tribunal agreed. In analyzing that Clause, the tribunal found "no doubt" that the "ordinary meaning" of the clause meant that " the State [could] determine the scope of its own essential security interests."[141] The State needed only to "plausibly" link the challenged measures to that interest, subject only to a "'light touch' good faith review—not too restrictive as to infringe the explicit self-judging language" of the provision.[142]

89. The *Seda* tribunal found the self-judging character of the ESI Clause to be a matter of "ordinary meaning" and that its application displaced the substantive investment law regime that might "otherwise" apply:

> On the basis of the interpretation of the ordinary meaning of Article 22.2(b) of the TPA, it can be concluded that ***the ESI Provision is a self-judging exception*** to the TPA, which allows a Contracting State to invoke an interest ***that it judges*** to be critical for its security as a justification for the measures – which may otherwise be in violation of the substantive provisions of the TPA – ***that it considers necessary*** to further that interest, with some connection between the former and the latter. ***Once the ESI Provision is invoked, the tribunal is directed towards a finding that it applies***.[143]

90. The *Seda* tribunal's reasoning aligned with the non-disputing party submissions of the U.S. in that case, which had explained that reading the ESI Clause as "self-judging accords with the long-standing U.S. position that similarly worded essential security interests exceptions

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[139] *Seda*, ¶765 (**RL-0219**).

[140] *Seda*, ¶¶421-445 (**RL-0219**).

[141] *Seda*, ¶662 (**RL-0219**).

[142] *Seda*, ¶¶638,650-655 (**RL-0219**).

[143] *Seda*, ¶662 (**RL-0219**).

in U.S. agreements are to be read as self-judging"[144] and that "once a State Party raises the exception…the Tribunal must find that the exception applies to the dispute before it."[145]

91. The *Seda* tribunal's interpretation of an identical ESI Clause mirrors Nicaragua's submissions in this case.[146] The ordinary meaning of Article 21.2(b) is unambiguously self-judging. However, to the extent that the Tribunal sees the need to go beyond the plain text of Article 21.2(b), it should give effect to the "special meaning" to which the DR-CAFTA Parties attach to Article 21.2(b).[147]

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[144] *Seda* Merits Hearing (Day 2), May 3, 2022, Tr.387:11-12,388:6-9 (U.S. Submission) ("*Seda* U.S. Submission") (**RL-0218**).

[145] *Seda* U.S. Submission, Tr.388:15-18 (**RL-0218**).

[146] Although the language of Article 22.2 of the TPA and 21.2(b) of DR-CAFTA is identical, the TPA includes interpretative Footnote 2 providing that "[f]or greater certainty, if a Party invokes Article 22.2 in an arbitral proceeding initiated under Chapter Ten (Investment) or Chapter Twenty-One (Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies." As the *Seda* tribunal noted, "'*for greater certainty*' implies that the ***footnote does not add additional elements*** to the ESI Provision, but merely ***explains the meaning*** the Contracting States attributed to it." *Seda*, ¶657 (**RL-0219**); *see also Seda* U.S. Submission, Tr.389:3-6 (**RL-0218**) ("[T]he United States uses the words 'for greater certainty' in its International Trade and Investment Agreements to introduce ***confirmation*** regarding the meaning of the Agreement."). Whereas the TPA is more recent than DR-CAFTA, this means that Footnote 2 does not alter but confirms the meaning of the identical language of the two ESI clauses. The *Seda* tribunal found this footnote confirmatory of its "limited discretion," but that it left open the standard of review to be applied. *Seda*, ¶¶660-661 (**RL-0219**).

[147] VCLT Art. 31(4) (**CL-0121**) provides that a "special meaning" shall be given to a treaty provision "if it is established that the parties so intended." As Prof. Burke-White explained and the *Seda* tribunal recognized, U.S. treaty drafters adopted the deliberately self-judging "it considers necessary" language in the 2004 U.S. Model BIT, on which DR-CAFTA and the TPA are based. *See* Burke-White I, ¶27 (**RER-06**); *Seda*, ¶704 (**RL-0219**).

B. The *Seda* Tribunal and Nicaragua Understood the Historical Context of the ESI Clause in U.S. Investment Treaty Practice in Exactly the Same Way

92. The *Seda* tribunal found it "helpful" to "confirm" the ordinary meaning of the TPA's ESI Clause by "supplementary means of treaty interpretation."[148] Upon reviewing relevant history and *travaux*, that tribunal arrived at exactly the same understanding of the evolution of the ESI Clause in U.S. investment treaty practice as set out in Nicaragua's pleadings and Prof. Burke-White's expert report:

> [T]he wording of the ESI Provision in the TPA builds upon the U.S. treaty practice which has evolved following the ICJ judgements in Nicaragua and Oil Platforms cases…Following this ICJ jurisprudence, the U.S. adopted a new formulation for the next generation of its international treaties and Model BITs to include the "it considers necessary" clause.[149]

The *Seda* tribunal thus concluded that this Clause "stands in contrast with the language of essential security exception interpreted by the ICJ in *Nicaragua* and should be interpreted *a contrario* as a self-judging provision."[150]

93. These principles apply with even greater force for DR-CAFTA because Nicaragua was a party to the ICJ case that resulted in what U.S. officials called "the Nicaragua problem."[151] Therefore, Nicaragua's consent to the crucial "it considers necessary" language must be regarded as exceptionally deliberate and informed.[152]

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[148] *See Seda*, ¶669 (**RL-0219**) (discussing VCLT Articles 31-32).

[149] *Seda*, ¶700 (**RL-0219**); *see also* Tr.213:2-217:3; Burke-White I, ¶¶26-34 (**RER-06**); Rejoinder, ¶¶542-547.

[150] *Seda*, ¶704 (**RL-0219**).

[151] *See* Burke-White I, ¶¶16-17, 22, 31 (**RER-06**); **Tr.**213:2-214:14.

[152] Since DR-CAFTA, Nicaragua has concluded investment treaties with other States that include the same self-judging language found in DR-CAFTA Article 21.2. *See, e.g.*, Republic of Korea-Republics of Central America FTA (2019), Art. 23.2(b) (**RL-0213**) ("Nothing in this Agreement shall be construed…to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security or the

C. The *Seda* Tribunal Also Rejected the Same Flawed Arguments Riverside Has Raised Here in an Effort to Escape the Effect of Article 21.2(b)'s ESI Clause

94. Riverside made several arguments in an effort to escape the effect of Article 21.2(b)—all previously rebutted by Nicaragua and Prof. Burke-White. These should fail for the reasons advanced both in Nicaragua's pleadings and in the *Seda* Award.

1. The ESI Clause Precludes Both Wrongfulness and Liability

95. Riverside has argued that, if Article 21.2(b) applies, Nicaragua's "responsibility for loss or damage persists," and that the self-judging ESI Clause should "have no impact at all on the consequence of the State's invocation."[153]

96. The *Seda* claimants unsuccessfully made this argument.[154] Observing that "the operation of the ESI Provision is such that it precludes wrongfulness,"[155] the *Seda* tribunal found that "the *effet utile* of Article 22.2(b) would be close to nonexistent if a State could continue to apply the measures in violation of the TPA but would still be required to pay compensation for applying them."[156] It found that the ESI Clause "is not merely an exception to the remedies regime" but "if invoked properly, it excepts the measures taken by Respondent from the scope of

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protection of its own essential security interests."); Mexico-Central America FTA (2012), Art. 20.3(b) (**RL-0214**).

[153] **Tr.**109:3-12.

[154] *Compare Seda*, ¶¶271, 669 (**RL-0219**) (claimants cited *Eco Oro* and argued that "Article 22.2(b) serves as an '[e]xception' to the TPA's allowance of restitution or withdrawal of measures as a remedy.") *with* Reply, ¶¶1213-1222 (citing *Eco Oro* and alleging that "nothing in CAFTA Article 21.2(b)'s essential security provision allows Nicaragua to absolve itself of liability for breaching the CAFTA or shield it from paying compensation as a remedy" and "[s]ince Riverside is not asking for restitution, CAFTA Article 21.2(b) has no impact on these proceedings").

[155] *Seda*, ¶736 (**RL-0219**); *see also* **Tr.**225:15-23.

[156] *Seda*, ¶740 (**RL-0219**).

the treaty" and thus a tribunal's inquiry "stops short of establishing wrongfulness…let along awarding any compensation."[157]

97. The *Seda* tribunal also rejected Riverside's related argument that the ESI Clause only forecloses a restitution remedy, finding "no support for Claimant's limited interpretation of the word 'Exceptions'" and that this Clause "placed in the context of the TPA, should be understood ***as an exception to the coverage of the Treaty*** which is placed hierarchically above the provisions regulating investors' substantive rights and dispute resolution provisions[.]"[158]

98. This reasoning is consistent with Nicaragua's submissions and Prof. Burke-White's explanation that "[t]he principle of effectiveness of treaty interpretation further confirms that an NPM provision must absolve the state of any liability."[159]

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[157] *Seda*, ¶741 (**RL-0219**).

[158] *Seda*, ¶¶669-670,672 (**RL-0219**); *see also id.* ¶671 (noting the express "subordination of Chapter 10 'Investment' to other chapters of the TPA, including Chapter 22 'Exceptions.'"); *id.* ¶670 ("Given that the other exceptions contained in this Chapter constitute exceptions to the matters covered by the Treaty, it would be counter-intuitive to assume that the essential security '*[e]xception*' is aimed at a different – implicit and narrow – outcome."). *Compare* Article 10.2(1) of the U.S.-Colombia TPA (**RL-0217**) *with* Article 10.2 of DR-CAFTA (**CL-0001**) (each providing that "[i]n the event of any inconsistency between [DR-CAFTA's Investment] Chapter and another Chapter, ***the other Chapter shall prevail*** to the extent of the inconsistency").

[159] *See* **Tr.**225:15-226:7; Rejoinder, ¶558; Burke-White I, ¶68 (**RER-06**). Like Riverside, the *Seda* claimants made extensive citation to *Eco Oro* in an attempt to escape the operation of the applicable ESI Clause. *Seda*, ¶¶271,435 (**RL-0219**). While noting these arguments in its summary of the parties' position, *Eco Oro* barely registered in the tribunal's analysis. *See generally Seda*, § F.I. (**RL-0219**) (*Eco Oro* was not cited in the tribunal's analysis). That was correct, given that Article 2201(3) of the Canada-Colombia FTA, the applicable provision in *Eco Oro*, does not contain explicit self-judging language and applies only to the treaty's investment chapter. *See* Canada-Colombia FTA (2011), Art. 2201(3) (**RL-0221**). DR-CAFTA contains an equivalent environmental measures exception that likewise is limited to Chapter 10. *See* DR-CAFTA, Article 10.11 (**CL-0001**). Article 10.11 is irrelevant to this dispute, as is *Eco Oro*.

2. MFN Does Not Supersede the ESI Clause

99. Like Riverside, the *Seda* claimants argued the MFN clause disregarded the ESI Clause because similar exceptions did not appear in other Colombian investment treaties.[160] The *Seda* tribunal dismissed this argument as "artificial," observing "the purpose of Claimants' attempted import (or, rather, export in this case) is precisely to safeguard the dispute resolution provisions of Chapter 10 of the TPA" and that the TPA's MFN clause could "not operate to exclude the effects of" the ESI Clause.[161] The same principle applies under DR-CAFTA.[162]

100. Riverside's MFN argument also fails because, as previously demonstrated, Article 21.2(b) is an exception to the entire Treaty and does not fall within the scope of Article 10.4.[163] Moreover, *ejusdem generis* prevents the absence of an ESI Clause in another treaty from serving as a basis to strike a clause in the base treaty.[164] In any case, Nicaragua's DR-CAFTA Annex II reservation explicitly precludes application of Article 10.4 in these circumstances.[165]

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[160] *Seda*, ¶¶796-799 (**RL-0219**). *See also* **Tr.**111:18-20.

[161] *Seda*, ¶¶798-799 (**RL-0219**).

[162] This remains true notwithstanding interpretive Footnote 2 in the TPA. Where the TPA is more recent than DR-CAFTA, Footnote 2 merely confirms the meaning of the identical language of the two ESI clauses. *See supra* n.146. As an exception to DR-CAFTA, Article 21.2(b) cannot be displaced by MFN, especially here where Riverside erroneously attempts to export the ESI Clause.

[163] *See* Rejoinder, ¶¶535-547; *Seda*, ¶671 (**RL-0219**) (noting the express "subordination of Chapter 10 'Investment' to other chapters of the TPA, including Chapter 22 'Exceptions.'").

[164] Rejoinder, ¶¶535-547; **Tr.**223:4-225:4; **RD-01**, at 108-109; Rejoinder, ¶¶538-539; *CMS v. Argentina*, ¶377 (**RL-0147**) (holding that "the mere absence of such a provision in other treaties does not lend support to this argument, which would in any event fail under the *ejusdem generis* rule[.]").

[165] *See* **Tr.**222:24-223:3; **RD-01**, at 107; Rejoinder, ¶537; Burke-White I, ¶¶70-71 (**RER-06**) ("an ordinary meaning interpretation of the text of the treaty makes clear that the NPM clause is not within the scope of most favored nation treatment" because "all of the provisions of the treaty, including article 10.4, are subject to the limitations of the NPM clause.").

3. The Essential Security Clause Is Not a "Necessity" Defense

101. The *Seda* tribunal also distinguished a self-judging ESI Clause from the customary international law defense of "necessity." The "necessity" defense is not self-judging and is an affirmative defense, quite unlike a self-judging essential security clause.[166] Echoing Nicaragua's pleadings and Prof. Burke-White's analysis, the *Seda* tribunal warned against "conflating two distinct legal norms despite the *lex specialis* nature of the treaty-based provision."[167]

102. Instead, the *Seda* tribunal quoted the *CMS* annulment decision for the proposition that an ESI Clause is "a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply," while necessity "is an excuse which is only relevant once…a breach of those substantive obligations" is found.[168] *Seda* thus "reject[ed] Claimants' contention that the ESI Provision constitutes an 'affirmative defense against liability" and explained that the ESI Clause "does not presuppose that an act has been committed that is incompatible with the State's international obligations and is therefore 'wrongful' but instead…precludes the measures from being incompatible with the Treaty in the first place."[169]

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[166] *See Seda*, ¶682 (**RL-0219**) ("Unlike Article 25 of the ILC Articles, it does not "presuppose[] that an act has been committed that is incompatible with the State's international obligations and is therefore 'wrongful'. Instead, it precludes the measures from being incompatible with the Treaty in the first place.") (*citing Sempra v. Argentina*, ICSID Case No. ARB/02/16, Decision on Annulment, June 29, 2010, ¶200 (**RL-0215**)).

[167] *Seda*, ¶676 (**RL-0219**).

[168] *Seda*, ¶678 (**RL-0219**).

[169] *Seda*, ¶682 (**RL-0219**). *See also* Burke-White I, ¶¶11,57-58,66-69,78 (**RER-06**); Rejoinder, ¶¶548-560; Counter-Memorial, ¶¶286-289.

D. Article 21.2(b) Is Subject Only to a "Light-Touch" Good Faith Review

103. The *Seda* Award accords with Nicaragua's position that the ***only*** exception to the non-reviewability of a State's invocation of a self-judging ESI Clause is a good faith review.[170] Crucially this is not substantive review and ***cannot*** become substantive review consistent with the treaty design described above.[171]

104. This is an extremely deferential standard, which the *Seda* tribunal described as "'light-touch' good faith review," and consistent with Nicaragua's position and Prof. Burke-White's report.[172] More exacting review would limit the very sovereign discretion to identify and address a State's essential security interests that the ESI Clause is designed to protect:[173] "it is for the State to determine the scope of its 'own essential security interests,'" subject only to the obligation of good faith.[174] The Tribunal's task is therefore limited to confirming that the nexus

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[170] In *Seda*, Colombia argued that even good faith review was precluded because the ESI Clause is self-judging, which, Colombia argued, made the claims before the tribunal *ipso facto* non-justiciable. *See Seda*, ¶¶711-712 (**RL-0219**). Nicaragua, by contrast, has not challenged the availability of (extremely deferential) good faith review.

[171] *Seda*, ¶748 (**RL-0219**) ("[T]he Tribunal considers a good faith review – a standard supported by jurisprudence and legal scholars – sufficiently balanced to ensure proper application of Article 22.2(b) of the TPA without infringing on its self-judging nature.").

[172] *Seda*, ¶655 (**RL-0219**). *See Russia – Measures Concerning Traffic in Transit*, ¶7.146 (**WBW-018**) (In analyzing the good faith standard of review, the panel held "it is for Russia to determine the 'necessity' of the measures for the protection of its essential security interests. This conclusion follows by logical necessity if the adjectival clause 'which it considers' is to be given legal effect."); Burke-White I, ¶¶36-48 (**RER-06**).

[173] *Seda*, ¶791 (**RL-0219**) ("[T]he purpose of a self-judging ESI Provision is precisely to afford a State a measure of discretion in identifying essential security concerns and addressing them…"). *See also Seda*, ¶644 (explaining that "by definition, the essential security interests of a State are an expression of its sovereignty, so the Tribunal is especially conscious of the associated limitations to its mandate and scope of inquiry").

[174] *Seda*, ¶650 (**RL-0219**). *See id.*, ¶¶644-646 (applying a "broad margin of appreciation" because "the essential security interests of a State are an expression of its sovereignty").

between the challenged measure and the identified essential interest satisfies a "minimum requirement of plausibility."[175]

105. The standard articulated in *Seda* coincides with Prof. Burke-White's opinion that "the question a tribunal must ask is whether a reasonable person in the state's position could have concluded that there was a threat to [essential security]…sufficient to justify the measures taken."[176] Indeed, the *Seda* tribunal understood its "light touch" standard as consistent with other similarly deferential formulations of the appropriate standard of review:

> The Tribunal finds the ***plausibility standard an appropriate benchmark*** against which to evaluate the nexus between the measures adopted by the State and the essential security interests sought to be protected under Article 22.2(b) of the TPA. In the Tribunal's view, it carries an implication of a ***'light-touch' good faith review*** – not too restrictive as to infringe on the explicit self-judging language of the ESI Provision. The Tribunal also considers that the ***other tests invoked by the Parties*** (*i.e. bona fide* connection, rational connection, ***prima facie*** standard) would lead to a ***very similar, if not identical***, scope of review.[177]

106. Importantly, the *Seda* tribunal emphasized that good faith review did not involve any inquiry into whether the State had adopted the best or most effective measures in response to the challenge to an essential security interest: "[i]t suffices that the measures could serve such purpose on their face, i.e., are not 'so remote from, or unrelated to' the stated objective as to render the connection implausible. The fact that a different measure taken or not taken by a State could be more plausibly connected with the declared essential security interest is not a relevant consideration."[178]

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[175] *Seda*, ¶653 (**RL-0219**) (*citing Russia – Measures Concerning Traffic in Transit*, ¶¶7.138-7.139 (**WBW-018**)); *see also* Burke-White I, ¶49 (**RER-06**).

[176] Burke-White I, ¶¶40,49-50 (**RER-06**).

[177] *Seda*, ¶655 (**RL-0219**).

[178] *Seda*, ¶787 (**RL-0219**). *See also* Burke-White I, ¶¶56,62-64 (**RER-06**).

107. The Tribunal thus cannot independently weigh Nicaragua's peaceful approach to the invasion against Riverside's insistence that Nicaragua should have deployed "military forces." So long as Nicaragua's measures satisfy the "plausibility" standard articulated in *Seda*, its good faith invocation of Article 21.2(b) provides a complete defense to Riverside's claims.

E. Nicaragua Invoked Article 21.2(b) in Good Faith and Riverside Has Not Met Its Burden of Showing Otherwise

108. Nicaragua has proven that it invoked Article 21.2(b) in good faith.[179]

109. Preliminarily, international law provides that Nicaragua is entitled to a "rebuttable presumption of the regularity and validity of acts" of States.[180]

110. Despite its conclusory allegations, Riverside has not produced objective evidence showing Nicaragua could have acted contrary to good faith,[181] and thus Riverside has failed to overcome its "heavy burden of proof" in rebutting the "good faith" standard.[182]

111. It was neither unreasonable nor implausible for Nicaragua to consider an armed invasion of HSF led by former *Contras* who warned they would "fight" for the property, to

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[179] Rejoinder, ¶¶550-551; Counter-Memorial, ¶¶293-305.

[180] Bin Cheng, *General Principles of Law*, p.305 (**RL-0220**) (*citing Valentiner Case*, German-Venezuelan Mixed Claims Commission (1903) ("*Omnia rite acta paesumuntur*. This universally accepted rule of law should apply with even greater force to the acts of a government than those of private persons.").

[181] Instead, Riverside simply misconstrues the relevant inquiry and does not meaningfully engage the facts Nicaragua alleged in its Article 21.2(b) argument. *See* **Tr.**107:4-8 ("In essence, they [Nicaragua] have to show you that there's an essential security interest related to avocados or guacamole production or something in some way[.]").

[182] *See CC/Devas v. Republic of India*, PCA Case No. 2013-09, Award on Jurisdiction and Merits, July 25, 2016, ¶245 (**RL-0216**) ("An arbitral ***tribunal may not sit in judgment on national security matters*** as on any other factual dispute arising between an investor and a State. National security issues relate to the existential core of a State. An ***investor who wishes to challenge a State decision in that respect faces a heavy burden of proof***, such as bad faith, absence of authority or application to measures that do not relate to essential security interests."); *Seda*, ¶655 (**RL-0219**).

implicate its essential security interests.[183] The record evidence overwhelmingly establishes that the invasion of HSF presented Nicaragua with a challenge that, put mildly, ***it could have reasonably considered*** to implicate its essential security interest in maintaining internal peace and protection of its population.[184]

112. Nor was it unreasonable or implausible for Nicaragua to protect this essential security interest through the measures it adopted, namely avoiding the use of force to remove these armed invaders peacefully and permanently from HSF.

113. It follows that all measures taken in response to the unlawful invasion and occupation of HSF fall within the protection of Article 21.2(b). These include Nicaragua's decisions not to remove forcibly the invaders from HSF and to negotiate their peaceful resettlement (particularly during the August 2018-August 2021 time frame). In addition, and mindful of the Tribunal's question at the Hearing[185] as to what these measures might be, Nicaragua respectfully identifies the following:

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[183] For the avoidance of doubt, Nicaragua considers that its measures were not just "plausible" but entirely justified and correct under the circumstances. The legal standard is nevertheless deferential.

[184] *Seda* ¶643 (**RL-0219**) (listing "the keeping of its internal peace" as among recognized essential security interests of any State and collecting authorities on the same). *See also id.* ¶646 (noting the "broad margin of appreciation a Contracting State enjoys in identifying its essential security interest").

[185] **Tr.**207:18-21. Nicaragua has sought to be as inclusive as possible in identifying the measures, notwithstanding the imprecision and evolution of Claimant's case. Respondent thus reserves the right to include additional measures where it considers in good faith that such measures fall within the ambit of Article 21.2(b).

- **May 2018**: The Shelter Order.[186]

- **June 2018 through August 11, 2018**: Peaceful eviction of illegal occupants from HSF, who return shortly afterwards in light of Riverside's inaction.[187]

- **August 2018 – January 2019**: Nicaragua opens dialogue with invaders in which State representatives emphasize that the property is privately owned by Inagrosa and the occupation is illegal.[188]

- **January 2019**: Government officials meet with invaders, ordering them to leave peacefully, resulting in the voluntary department of some invaders immediately after this meeting.[189]

- **January 24, 2019**: Nicaragua forms a "Commission for the purpose of evicting Finca Santa Fé." That same day, the Commission and the invaders execute a resolution acknowledging: (i) HSF is privately owned; (ii) its occupation is illegal; (iii) the illegal occupants vacate in two phases; and (iv) Nicaragua will relocate them elsewhere.[190]

- **April 28, 2021**: The Government summons leaders of the families remaining on HSF to a meeting about their relocation.[191] Two days later, a meeting between the Government and representatives of the illegal occupants occurs at the Attorney General's office in Managua regarding removal of the remaining illegal occupants at HSF.[192]

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[186] *See* Video of Opening of the National Dialogue-President Daniel Ortega speech (**C-0339-SPA**); National Police Press Release No.25–2018, May 27, 2018 (**R-0180**); National Police Press Release No.26–2018, May 28, 2018 (**R-0181**); "Citizens' Security, a concern for all," National Police, May 28, 2018 (**R-0192**); Herrera II, ¶24(a) (**RWS-12**) ("Even though Mr. Gutiérrez denies that we informed him about the Shelter Order, in that conversation, I told him that at that time we could not provide immediate assistance because of the situation of the roadblocks and because of the Shelter Order, but regardless, we were going to monitor the situation.").

[187] Castro I, ¶¶37-39 (**RWS-02**).

[188] Gutiérrez-Rizo I, ¶68 (**RWS-01**).

[189] *Id*.

[190] Castro I, ¶39 (**RWS-02**); Commission Meeting Minutes, January 24, 2019 (**R-0050**).

[191] Gutiérrez-Rizo I, ¶71 (**RWS-01**); Summons by Jinotega Departmental Attorney's Office to HSF occupants, April 28, 2021 (**R-0066**).

[192] Gutiérrez-Rizo I, ¶71 (**RWS-01**).

- **May 4, 2021**: The Government meets with remaining illegal occupants at HSF, presents relocation options, and orders them to leave immediately.[193] Almost all remaining illegal occupants comply, while 112 illegal occupants (out of over 500 original invaders) remain.[194]

- **August 13, 2021**: The Government convenes another meeting at HSF to give remaining illegal occupants a deadline to leave the property.[195]

- **August 18, 2021**: Nicaraguan police peacefully evict all remaining illegal occupants.[196]

114. For Nicaragua to be held liable for resolving an enduring land dispute that caused the armed invasion and occupation of HSF by armed former revolutionaries and their families peacefully would be a perverse outcome. Article 21.2(b)'s self-judging ESI Clause preserves the State's good faith discretion to act in such a scenario. It precludes any liability here.

F. Nicaragua Timely Raised Article 21.2(b)

115. Finally, Nicaragua timely raised its essential security defense for the first time in its Counter-Memorial. Article 21.2(b) contains no timing requirement, and none should be inferred where Riverside had a full and fair opportunity to address the defense.[197]

116. *Seda* supports Nicaragua's position. There, the tribunal reasoned that the ESI Clause "does not contain any reference to a point in time at which it must be invoked" and thus rejected "Claimant's suggestion that Respondent ought to have identified its essential security

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[193] Gutiérrez-Rizo I, ¶72 (**RWS-01**).

[194] *Id*.

[195] Gutiérrez-Rizo I, ¶74 (**RWS-01**).

[196] *Id*.

[197] *See* Tribunal Question 2. While the timing of an essential security defense could be abusive (*e.g.*, after the close of evidence or where there is no opportunity for a response), this is not such a case.

interest *as such* in connection with implementing the measures against Claimants."[198] In *Seda*, the ESI Clause was invoked for the first time in its Rejoinder and still found timely.[199]

117. The *Seda* tribunal found timing arguments based on denial of benefits clauses to be "inapposite," noting such clauses are "by definition, forward-looking," while "[a]n essential security exception is, on the other hand, necessarily invoked in a specific case and only after an essential security concern is implicated."[200]

IV. NICARAGUA DID NOT BREACH ITS DR-CAFTA OBLIGATIONS

118. Nicaragua did not breach its obligations under DR-CAFTA, regardless of whether Riverside alleges a breach of FET, MFN, NT standards (all addressed in Nicaragua's submissions), an expropriation (addressed in Nicaragua's submissions and, for a judicial expropriation, above in Section §II.D.), or a breach of FPS.[201]

119. Riverside concedes Article 10.5's FPS obligation is one of diligence, not strict liability: it requires Nicaragua to take measures to protect investment that are reasonable in the circumstances.[202] Nicaragua did so, and there has been no FPS breach.

120. Nicaragua's measures were ultimately successful in clearing HSF permanently and peacefully. Riverside nevertheless alleges the police provided its investment "no protection whatsoever" and accuses Nicaragua of "blatant neglect [that] falls woefully short of meeting

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[198] *Seda*, ¶616 (**RL-0219**). *Id.* ¶¶616-620.

[199] *Seda*, ¶¶613,620 (**RL-0219**).

[200] *Seda*, ¶617 (**RL-0219**).

[201] Nicaragua also incorporates its prior submissions regarding DR-CAFTA's civil strife exception in Article 10.6.

[202] Rejoinder, ¶632.

Nicaragua's treaty obligations."[203] Riverside insists that Nicaragua, should have quickly militarized its response to the invasion, suggesting in its pleadings that Nicaragua should have blockaded HSF, deployed specialized police teams, fired warning shots at armed occupiers, and even deployed the army to drive out the invaders.[204]

121. That is not what "full protection and security" means in international investment law. The standard neither mandates success nor prescribes specific measures; it requires only that a State "adopt measures that are reasonable to protect the investment, taking into account the circumstances of the case" and the available resources.[205] The FPS standard does not oblige States to deploy armed forces against their civil population—let alone against armed former rebels and their families—to accommodate impatient investors, especially when peaceful alternatives are available.

122. Equally important, the FPS standard does not invite tribunals to second-guess difficult governmental decisions. To the contrary, FPS embodies a wide "margin of appreciation" for policies consistent with reasonableness in the circumstances.[206] Indeed, a State's "margin of appreciation" is at its broadest extent when dealing with the deployment of armed forces and

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[203] **Tr.**32:20-21.

[204] **Tr.**32:14-33:20.

[205] *South American Silver v. Bolivia*, ¶687 (**RL-0016**). *See also Glencore v. Bolivia*, ¶241 (**RL-0188**) ("[T]ribunals that have interpreted this obligation found, in the context of different treaties with some textual variations, that it imposes an objective standard of 'vigilance' or 'due diligence' and, more specifically, that it does not impose 'strict liability' on the State. These tribunals have also considered this due diligence obligation to require the adoption of 'measures of precaution', 'active measures', 'reasonable action' or 'reasonable measures.'"); Counter-Memorial, ¶¶359-371; Rejoinder, ¶¶633-642.

[206] Counter-Memorial, ¶¶359-371; Rejoinder, ¶¶633-642; *Peter Allard v. Barbados*, ¶244 (**RL-0188**) ("The obligation is limited to reasonable action, and a host State is not required to take any specific steps that an investor asks of it.").

police units.[207] That is especially so because basic considerations of morality, proportionality, and human rights—many of which also bind the State as a matter of law—mean that the use of force to protect property will reasonably be avoided when non-violent alternatives are available.

A. Nicaragua's Response to the Occupation Was Consistent with Article 10.5

123. Riverside alleges an FPS breach in Nicaragua's choice not to carry out a heavy-handed response to the armed occupation of HSF, despite the undisputed presence armed former *Contras*.[208] Nicaraguan officials knew that the occupiers were heavily armed veterans who had fought against the State before in the same region during Nicaragua's civil war. They also knew the occupiers had explicitly threatened to "fight" for their home.[209] Removing the invaders by force thus implied a significant risk of violence and bloodshed.

124. While the civil strife throughout Nicaragua in 2018 is relevant to Nicaragua's initial response to the occupation, Nicaragua ultimately had to grapple with the question of how to remove the invaders permanently from HSF: peacefully or by force. The evidence shows that force was a bad option—both before and after the civil strife.[210]

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[207] *Louis Dreyfus v. India*, ¶382 (**RL-0052**) ("questions about the proper deployment of law enforcement recourses [are] generally judgment calls…and tribunals should be wary of second-guessing [them].") In *Tekfen* the claimant tried unsuccessfully to litigate the deployment of specific military units, including through expert testimony; *Tekfen-TML Joint Venture v. Libya*, ¶7.7.7 (**RL-0190**). Counter-Memorial, ¶¶359-371; Rejoinder, ¶¶633-642.

[208] *See supra* §II.C.

[209] Letter from El Pavón Cooperative to the Attorney General of the Republic of Guatemala of Sept. 5, 2018 (**R-0065**); *see also supra* §II.C.

[210] Despite resource constraints that were even more severe than usual, Nicaragua's initial response caused the occupiers (if temporarily) to leave the grounds, but only returned when Riverside took no steps to secure HSF. *See supra* §II.C.

125. During the nationwide disturbances, the police were outnumbered and outgunned, and a clash at HSF might also have inflamed or been exacerbated by the wider political violence affecting Nicaragua at the time.[211]

126. Later, though more resources were available, forcibly removing the invaders, potentially with the military, would still have involved a substantial risk of armed clash between Nicaragua and its citizens, even if the result might have been "better" for Riverside.

127. Recent awards in analogous cases confirm that Nicaragua's approach to securing Claimant's rights peacefully was consistent with full protection and security. In *South American Silver*, for example, local communities opposed a mining project, leading to significant violence and social unrest.[212] Like Riverside, the investor in *South American Silver* argued that Bolivia breached its FPS obligation by not intervening when requested and that it failed to "militarize" the surrounding areas.[213] The tribunal rejected the claim. Deferring to the State's experience that "militarizing" disputes of this nature was unlikely to resolve the conflict, the tribunal found that measures like negotiations, community dialog, and dropping criminal charges against protestors who ceased occupying the mine were all consistent with Bolivia's FPS obligation.[214] Noting that FPS requires a state "to adopt measures that are reasonable to protect the investment, taking into

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[211] *See supra* §II.C.

[212] *South American Silver*, ¶247 (**RL-0016**).

[213] *Id*. ¶90 (**RL-0016**).

[214] *South American Silver*, ¶¶689-690 (**RL-0016**) (officials "participated in meetings with community members, objectors, and supporters of the Project…for the purpose of resolving the social conflict that had erupted in the areas due to the Project").

account the circumstances of the case," the tribunal held that Bolivia's refusal to militarize the dispute meant it had failed to take reasonable measures to protect the mine.[215]

128. Similarly, in *Glencore*, roughly a thousand members of a mining cooperative had violently occupied a mine.[216] Despite the investor alleging an FPS breach, the tribunal deferred to Bolivia's choice of how to approach a volatile situation and Bolivia's judgment that more forceful police action at the mine could have had ended in a "human catastrophe," pitting armed police against miners armed with dynamite, *inside the mine*.[217] The tribunal found that the State had acted consistent with its FPS obligations by instead pursuing negotiations with the invaders, and that its position that "the use of force in police action is only permitted as a last resort" to be "reasonable."[218]

129. The difficulty and risk of bloodshed recognized in *Glencore* and *South American Silver* compares to the situation at HSF, which required dislodging armed ex-*Contras* and their families from forested terrain that the invaders considered their home. Accordingly, Nicaragua was diligent about taking ***reasonable*** steps to secure Riverside's investment through a successful program of community engagement and resettlement. No FPS breach should be found.

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[215] *Id.* ¶687 (**RL-0016**). *See also id*. ¶690 ("the events that occurred…as a result of the police intervention in May and July of 2012 suggest that the intervention of the armed forces…was not an appropriate solution"); *id*. ¶¶691-696 (finding that measures including negotiations, community dialogs and abandonment of criminal proceedings against protestors "as a concession within the framework of an agreement to end the social conflict" around the claimant's investment, were all consistent with Bolivia's FPS obligation and that the State was not obliged to "militarize" the situation).

[216] *Glencore,* ¶¶117-127,247 (**RL-0189**) ("around one thousand *Cooperativistas*…took control of the mine by force").

[217] *Id.* ¶250 (**RL-0189**) (quoting testimony that "for the police it is practically impossible to enter inside a mine, guaranteeing the safety of the operation" where "the community…were armed with dynamite and could hide in the air ducts").

[218] *Id.* ¶¶244-251 (**RL-0189**).

B. Riverside's Conduct Is Material to the Tribunal's FPS Analysis

130. Where the FPS inquiry considers if a State's measures to protect an investment were reasonable under the circumstances, it would be anomalous to ignore some of the most important circumstances. Thus, in answer to Tribunal's **Question No. 3**, Respondent submits that the investor's own conduct should factor into an FPS analysis.[219]

131. Nicaragua's response can reasonably consider if an investor is inviting problems, antagonizing locals, failing to cooperate with authorities, or signaling that it does not care about its investment. Indeed, absent that consideration, the FPS standard would become a strict liability inquiry.

132. Tribunals have looked to the claimant's conduct in determining whether a State's measures conform to its FPS obligations. For example, in *Tekfen*, the tribunal began its FPS analysis by asking whether claimant had "requested" the State's protection of its investment amid disorders arising from a civil war.[220] While this was one of several factors, *Tekfen* confirms the relevance of an investor's conduct in determining whether a State behaved reasonably in the circumstances.

133. Investment law also recognizes the related principle that an investor has a duty of diligence with its own investment.[221] This point often arises in the context of autonomous FET claims: just as an investor may have legitimate expectations of State conduct, the State, in turn, has corresponding legitimate expectations that the investor will obey the law, pay its taxes, and

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[219] *See supra* §II.

[220] *Tekfen*, ¶¶7.7.8-7.7.59 (**RL-0180**).

[221] *See*, *e.g.*, *South American Silver*, ¶648 (**RL-0016**) ("the investor is entitled to protection of its legitimate expectations provided…that it exercised due diligence") (*citing Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, ¶ 333 ("The investor will have a right of protection of its legitimate expectations provided it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances.").

(so to speak) lock its own door at night rather than acting to make a bad situation worse.[222] Because the autonomous FET standard and FPS ultimately turn on interrelated factual questions of "reasonableness"—of the investor's expectations (FET) or the State's response to an incident (FPS)—it would be illogical for the investor's conduct to be relevant to "reasonableness" under one standard but not the other, especially given the close relationship of the two standards under international investment law.[223]

134. The Tribunal should therefore not ignore Riverside's own conduct in considering the reasonableness of Nicaragua's response to the occupation. The Tribunal should not overlook Claimant's awareness of the *El Pavón* community's claims or its failure to exercise minimal diligence to secure HSF after the police first removed the invaders.[224] The Tribunal should also consider that Claimant, beyond a few phone calls, failed to follow-up or work with Nicaraguan authorities to remove the invaders, instead preferring to bring litigation. And the Tribunal should not overlook Claimant's manifest disinterest in recovering possession of HSF and its preference to pretend that measures taken to protect HSF are somehow a "judicial expropriation."

135. All of these circumstances made Nicaragua's policy of resolving the recurring invasions of HSF through peaceful relocation—rather than by deploying "the army" and "swat teams," as Claimant proposed—even more reasonable under the circumstances. *Glencore* and *South American Silver* demonstrate the FPS standard does not require a State to take such

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[222] *South American Silver* ¶¶656 (**RL-0016**) ("[T]he Tribunal should assess the legitimacy and reasonableness of the investor's expectations, taking account of all the circumstances of the case and the investor's conduct. In this case, the Claimant knew, or should have known, that [its investment] operated in an area inhabited by indigenous communities, under specific political, social, cultural, and economic conditions…[Claimant's] conduct contributed to the social conflict and…its actions during the conflict contributed to aggravating it by generating divisiveness and escalating the clashes within the indigenous communities.").

[223] Both FET and FPS are assured by the same sentence of DR-CAFTA Article 10.5(1).

[224] **Tr.**497:6-10,493:12-517:10; Rural Titling Office file regarding Coop. El Pavón and HSF (**R-0228**).

measures against its own population.[225] Insisting on such measures would be even more unreasonable here.[226] Nicaragua had no duty to risk needless violence with its own citizens on behalf of an investor that did not really want its property back.

V. RIVERSIDE IS NOT ENTITLED TO COMPENSATION

136. Even if the Tribunal were to find Nicaragua liable, Claimant has not proven it suffered damages and should be awarded none (**Tribunal's Question No. 4**).

A. The Kotecha Model Is Unreliable

137. Riverside principally seeks damages based upon Mr. Kotecha's Discounted Cash Flow ("**DCF**") model ("**Kotecha Model**").[227] That Model purportedly projects cash flows Inagrosa "would have" generated from its alleged avocado and forestry businesses, but for the unlawful occupation of HSF. Specifically, this Model projects Inagrosa suffered alleged damages between US$168,531,589 and US$240,995,140 between June 16, 2018 (the "**Valuation Date**") and 2027.[228]

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[225] Unlike Riverside, the investors in *Glencore* and *South American Silver* clearly wanted to regain control of their mining investments and engaged actively with Bolivian authorities. *Glencore*, ¶251; *South American Silver*, ¶691. That an investor places a high value on its investment and cooperates with the authorities does not mean that its FPS claim should succeed and Nicaragua's choice of peaceful resettlement over armed force would not breach FPS even if Riverside *had* genuinely wanted to repossess its investment. However, Riverside's evident disinterest in HSF as anything other than a pretext for litigation nevertheless makes this case easier.

[226] There may be extreme circumstances where a State would arguably be under a duty to use "force" to regain control of a foreign investment, such as vital infrastructure. That is not the case here, as Riverside's conduct demonstrates.

[227] Riverside also has not overcome its burden of establishing causation or a legal basis for its damages theories. *See* Rejoinder, ¶¶705-772; Counter-Memorial, ¶¶425-456.

[228] Claimant seeks 100% of these amounts despite only owning 25.5% of Inagrosa. This is improper. *See* Rejoinder, ¶¶478-512.

138. The Hearing confirmed these "businesses" never existed. The avocado "business" was merely a "project" (in Inagrosa's words) that no one—including Riverside—wanted to finance and that ***never sold an avocado***:[229]

139. The forestry "business" never even reached the project stage; it never sold any logs and was just a 1990s-era concept that had been abandoned by 2018, when HSF was designated as a private wildlife reserve (where logging is forbidden).[230]

140. At the Hearing, Claimant insisted these businesses existed and that they were successful but that all supporting documentary evidence was destroyed or stolen.[231] Claimant thus asks the Tribunal to credit self-serving testimony from Messrs. Rondón and Luis Gutiérrez as reliable "proof," just like Mr. Kotecha did when he input his Model with their unfounded testimony.

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[229] Rondón I, ¶5 (**CWS-01**).

[230] Rejoinder, ¶¶211-234; **Tr.**456:6-457:21.

[231] **Tr.**68:9-11,137:9-17.

141. Contemporaneous evidence discredits their testimony and confirms Inagrosa was destitute by 2018.[232] Not even Messrs. Rondón and Luis Gutiérrez believe their testimony is reliable; they have revised it myriad times (including at the Hearing) and admitted to suffering from severe memory loss.[233] Pre-Hearing, their shifting testimony caused fluctuations of more than US$400 million in the Kotecha Model.[234] At the Hearing, Claimant effectively abandoned that Model and shifted its focus to HSF's property value.[235]

1. The Avocados-To-Riches Story Is Fiction

142. The Kotecha Model projects huge cash flows because it credits wholesale the "Avocados-to-Riches" story: Claimant's fantasy that Inagrosa transitioned from a failed coffee business in 2014 to one of the world's most valuable avocado businesses four years later. But the story Claimant and Mr. Kotecha tell ignores the "elephants in the room."[236]

[232] Rejoinder, ¶¶159-165.

[233] **Tr.**474:7-15,688:7-19,699:5-19.

[234] **Tr.**1858:13-16.

[235] **Tr.**1804:6-1806:6.

[236] **RD-01** at 144.

a. *No Objective Evidence Supports the Story*

143. Claimant's witnesses admitted that no documents support the key components of the Avocados-to-Riches story. No field reports demonstrate the 2017 harvest was successful, no feasibility studies blessed the alleged 2,500% expansion of the plantation, and no financial reports showed the plantation had any value.

144. Based on the above, experts Tim Hart and Ken Kratovil from HKA (formerly Credibility) testified that "[w]hen Mr. Kotecha was contacted, he should have quickly told the Claimant it was not remotely close to having a legitimate business or damages claim."[237]

145. Mr. Kotecha instead accepted Claimant's story that such evidence once existed before being lost in the invasion and through the alleged hacking of Inagrosa's emails.[238] Mr. Kotecha admitted that he took this explanation at face value and never performed an independent inquiry to confirm it.[239]

146. Claimant's "my dog ate my homework" defense is baseless for the reasons stated in the Rejoinder.[240] It also proves too much: it is inconceivable that a business worth hundreds of millions of dollars stored all of its records on a farm in one location and used only one email account—underscored by Mr. Rondón's testimony that Inagrosa ***never had access to the internet or around-the-clock electricity***.[241]

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[237] **Tr.**1957:22-1958:20.

[238] **Tr.**1895:16-1898:9.

[239] **Tr.**1897:12-18.

[240] Rejoinder, ¶¶46-59,66-83; **RD-01** at 147.

[241] **Tr.**586:19-587:7.

147. Mr. Kotecha conceded that nearly every input in his Model depended on "facts" that Messrs. Rondón and Luis Gutiérrez remembered years after the fact,[242] and that he did nothing to confirm their recollections.[243] Mr. Kotecha stood by these inputs even though Messrs. Rondón and Luis Gutiérrez repeatedly revised their "recollections", including at the Hearing.[244]

148. Mr. Rondón, for example, acknowledged that he did not know much about the avocado project because he was barely at HSF during its existence.[245] He also admitted that many of the inputs he fed Mr. Kotecha were wrong, such as the number of trees that were planted, the size of the plantation, and the export destinations.[246] These undisputed errors are also in the "business plans" upon which the Kotecha Model also relies.[247]

149. Luis Gutiérrez testified that he regularly revised his testimony about the avocado project because ***he suffers from memory loss***.[248] Put simply, the primary source for the Kotecha Model testified that he does not trust his own recollection.

150. Luis Gutiérrez's unreliable recollection was on display at the Hearing. He did not recall basic facts about the avocado project.[249] And he recanted portions of his written testimony. For example, Luis Gutiérrez initially testified that the plantation's first harvest had yielded 20kg of fruit per tree—a claim the Kotecha Model uses to project future yields for the plantation.[250]

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[242] **Tr.**1867:8-1868:10,1926:24-1927:11.

[243] **Tr.**1861:23-1862:9,1866:25-1910:6.

[244] *See generally* Messrs. Rondón's (**Tr.**478:14-623:16) and Gutiérrez's (**Tr.**698:20-852:11) testimony.

[245] **Tr.**592:3-593:3.

[246] **Tr.**479:8-481:8.

[247] **Tr.**937:21-941:9.

[248] **Tr.**688:7-17,699:7-19,700:10-22.

[249] **Tr.**698:12-699:15,700:10-22.

[250] Gutiérrez I, ¶150 (**CWS-02**).

But Luis Gutiérrez admitted that the yield was actually 2.5-3.75kg per tree, *i.e.*, ***roughly 18% of the amount he initially gave***.[251]

151. Despite this, Mr. Kotecha stood by his Model's inputs, even after his only source admitted that those inputs were wrong.[252] Mr. Kotecha similarly refused to modify (or discard) his Model despite other Hearing testimony debunking the Avocados-to-Riches story:

- Ms. de Rondón admitted the alleged expansion of the plantation "hadn't happened yet before the invasion" because Inagrosa could not secure funding,[253] undermining the Kotecha Model's assumption that an expansion had been underway by June 2018.[254]

- Mr. Rondón admitted that Inagrosa reported that HSF's land value ***decreased*** from 2015 to 2017, thus undermining the Model's assumption that HSF's value increased significantly in 2017 because of a successful first avocado harvest.[255]

- Mr. Rondón admitted that Claimant's worksheets identify who was working at HSF.[256] This admission undermines the Model's assumption that Inagrosa had scores of employees to handle tasks associated with a multi-hundred-million-dollar plantation when Inagrosa's worksheets show (at most) 14 employees from 2016-2018.[257]

- Mr. Welty admitted that Inagrosa had no facilities to store, package, process, or ship avocados by the Valuation Date, undermining the Kotecha Model's assumption that Inagrosa could commercialize its plantation by July 2018.[258]

- Luis Gutiérrez admitted that contemporaneous field reports showed that the avocado project was failing, contrary to the Kotecha Model's contrary assumptions.[259]

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[251] **Tr.**966:21-967:2.

[252] **Tr.**836:20-837:11,839:5-846:8,905:11-907:8.

[253] **Tr.**344:25-345:12.

[254] **Tr.**1921:15-1922:9.

[255] **Tr.**603:24-605:10.

[256] **Tr.**599:15-22; Inagrosa's Payrolls (**C-0354** to **C-0400**).

[257] Inagrosa's Payrolls (**C-0354** to **C-0400**).

[258] **Tr.**954:6-13; Kotecha II, ¶3.23 (**CES-04**).

[259] **Tr.**763:1-816:4,817:10-820:23.

b. *No Permitting*

152. Inagrosa never had permits for its avocado "business." Mr. Kotecha was content to ignore this fact because Mr. Rondón assured him in a letter that "no government approvals were required" for this business to move forward.[260]

153. That was untrue. In reality, an agricultural business in Nicaragua needs permits from water, phytosanitary, environmental, and export authorities to operate.[261] Claimant never seriously rebutted this testimony and did not challenge it at the Hearing.

154. At the Hearing, Mr. Kotecha changed his position, acknowledging that Inagrosa needed permits to sell and export avocados.[262] But he maintains this fact does not change his projections because he "assume[d]...[Inagrosa] would have gotten" the permits for the 2018 harvest (beginning in July 2018, per Mr. Rondón).[263] Mr. Kotecha could not explain why he assumed this, given his admission that permitting matters are "outside of [his] expertise."[264]

155. Indeed, Claimant declined to examine the only witnesses with permitting expertise at the Hearing. Their unrebutted testimony confirms that the agricultural permitting process in Nicaragua takes months or years to complete, requires applicants to meet specific conditions, and can be unsuccessful.[265] That testimony undermines Mr. Kotecha's assumption that Inagrosa would have applied for and secured the permits ***within two weeks*** (Valuation Date

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[260] Management Representation Letter, ¶43 (**C-0055**).

[261] *See* Lacayo I (**RWS-07**), Lacayo II (**RWS-16**), Moncada I (**RWS-05**), Moncada II (**RWS-14**), Mena I (**RWS-06**), González I (**RWS-09**), González II (**RWS-15**), Rosales I (**RWS-18**).

[262] **Tr.**1835:25-1836:6,1837:2-19.

[263] **Tr.**1893:24-1894:4.

[264] **Tr.**1893:24-1894:4.

[265] Rosales I, ¶¶20,32,34-35,49-54 (**RWS-18**); Moncada I, ¶¶15-17,20,25-27,32,35,39 (**RWS-05**); Moncada II, ¶¶24-26,34,39,42-45 (**RWS-14**); Gonzalez II, ¶¶65-66 (**RWS-15**); Lacayo II, ¶¶35-50,55-57,62 (**RWS-16**), Mena I, ¶¶20-23,29 (**RWS-06**).

to July 2018). Mr. Kotecha ignored all of this and simply assumed an unrealistic best-case-scenario for Inagrosa.

156. The Kotecha Model also assumes expansion of the plantation from 40 to 1,000 hectares. Mr. Kotecha assumed, based on Renaldy Gutiérrez's testimony, that Inagrosa could exploit its land without restriction.[266] However, Dr. Gutiérrez admitted that—unlike Dr. Sequeira and Ms. González—he has no experience with respect to Nicaraguan environmental law or private wildlife reserves.[267]

157. This is a critical error because HSF was designated as a private wildlife reserve in 2016 at Inagrosa's request.[268] As Dr. Sequeira testified, this designation restricts activities that may disturb the flora, fauna, and waterways.[269] The expansion Mr. Kotecha assumes would also have been impossible because half of HSF contains forests and areas near waterways where commercial activity is illegal. [270] There is thus an incompatibility between Riverside's expansion story, the contemporaneous evidence and the legal framework.[271]

158. Dr. Gutiérrez's opinions simply cannot be reconciled with contemporaneous documents reflecting Inagrosa's real-time understanding that it would have to preserve the property if designated as a reserve. Indeed, Inagrosa's 2016 wildlife reserve application advised

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[266] **Tr.**1893:24-1894:4.

[267] **Tr.**1450:9-16,1554:23-1555:1.

[268] Gonzalez II, ¶16,24 (**RWS-15**), Sequeira, ¶¶38.1-38.2, 40.3-41 (**RER-05**).

[269] **Tr.**1674:19-1676:10. *See also* Sequeira, ¶¶37.5-37.6, 37.10 (**RER-05**).

[270] Gonzalez I, ¶¶16-21 (**RWS-09**), Gonzalez II, ¶¶65-66 (**RWS-15**); **Tr.**1592:5-11,1595:8-13.

[271] **Tr.**1676:11-1677:12,1677:20-1679:7.

that it sought the designation to "preserve the forest area, protect water sources to provide a habitat for both fauna and flora and thus protect all the animals living in the forest."[272]

159. Put simply, Inagrosa never had plans to expand its plantation, instead contemplating a possible wildlife reserve for ecotourism once its farming business failed.[273] Mr. Kotecha's assumptions to the contrary are baseless.

c. *U.S. Ban on Nicaraguan Avocados*

160. Claimant's Avocados-to-Riches story is inextricably intertwined with Inagrosa's ability to sell avocados to the U.S. market. [274] But the U.S. ***still*** bans Nicaraguan avocados because of the invasive Medfly (pictured above).

161. Mr. Rondón knew about the ban since 2016 but could not explain why he omitted it from his 2022 management letter to Mr. Kotecha.[275] Mr. Welty also testified he knew about this ban since 2016 but could not explain why he omitted it from his "business plans."[276] And even Mr. Kotecha said he knew about the ban since the outset of the case but could not explain why he omitted it from his first expert report.[277]

162. These witnesses insisted at the Hearing that the U.S. would have lifted its ban ***after the Valuation Date***, defeating the entire notion of what a valuation date is supposed to mean and demonstrating the fallacy of the entire Kotecha Model. And because the ban is still in

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[272] **Tr.**1561:22-1562:24.

[273] **Tr.**1584:16-1585-17. *See also* Complete file for HSF private wildlife reserve (NIC00402 to NIC 00512), p.105-110 (**R-0228**).

[274] **Tr.**15:10-13.

[275] **Tr.**606:1-607:5.

[276] **Tr.**980:23-982:2,983:1-984:1,969:20-970:17,988:2-5,988:22-24.

[277] **Tr.**1851:14-1853:8.

effect today, Claimant effectively wants the Tribunal to re-imagine the entire world to fit its damages scenario.[278]

163. Claimant cites its exchange with staffers for a U.S. senator as its support.[279] But the Senator's office had no power to lift the ban, and advised Claimant's representatives that it should have Inagrosa ask Nicaragua's phytosanitary agency to start a formal process with its U.S. counterpart—something that Claimant's witnesses acknowledge ***never happened***.[280] Even if it did, Martín Rosales testified without rebuttal that the risk analysis can last more than a decade and there is no guarantee it will be successful.[281] Mr. Welty similarly testified that he recently learned Nicaragua started this dialogue with the U.S. in 2018 (because of a request from MECA Consulting), yet the ban was still in effect.[282]

164. Mr. Kotecha could not point to anything to support his Model's assumption that the U.S. would have lifted its ban by 2022. Instead, he testified that he arbitrarily came up with that date himself because he believed "Inagrosa was motivated enough to try to attempt to get into the US market."[283]

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[278] **Tr.**1857:7-18.

[279] Email from Russ Welty to Laura Sherman regarding USDA approval, September 19, 2016 (**C-0462**), Email from Carlos Rondon and Russ Welty to Laura Sherman, September 22, 2016 (**C-0463**), Email from Laura Sherman to Carlos Rondon and Russ Welty, September 22, 2016 (**C-0464**), Email from Laura Sherman to Carlos Rondon and Russ Welty, October 6, 2016 (**C-0465**), Email from Laura Sherman to Carlos Rondon and Russ Welty, October 18, 2016 (**C-0466**). Ms. Sherman was staff in US Senator Bennet's office.

[280] **Tr.**980:23-982:1; Rosales I, ¶44 (**RWS-18**).

[281] Rosales I, ¶¶41-45,50-54 (**RWS-18**).

[282] **Tr.**990:12-996:4; Rosales I, ¶47 (**RWS-18**).

[283] **Tr.**1857:7-17.

d. *No Experience or Know-How*

165. No one at Inagrosa had prior experience in running an avocado business.

166. Mr. Rondón testified he began the avocado project on a whim and learned on the job by attending conferences.[284] Although no one had ran a successful commercial Hass avocado plantation in Nicaragua, Mr. Rondón insisted Inagrosa would have because HSF is "the promised land" and Inagrosa's coffee experience would be sufficient.[285]

167. This puffery is akin to Mr. Rondón's tales about ferns. In the 2000s, Mr. Rondón bragged that Inagrosa would get rich by cultivating "leatherleaf ferns" at HSF despite having no prior experience.[286] He told this tale to Riverside, the Nicaraguan government, and even the U.S. Embassy.[287] But Mr. Rondón's fern project never made a cent.[288]

168. Luis Gutiérrez also conceded he had no prior experience growing avocados when he joined Inagrosa in 2015 but insists he became an expert because a Costa Rican Hass avocado expert taught him how to cultivate avocados over the phone and during short visits to HSF.[289] But the expert's field report from one of his visits to HSF says otherwise, identifying numerous errors in how Inagrosa farmed the Hass avocados, causing root rot and other defects.[290]

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[284] **Tr.**671:25-672:6.

[285] **Tr.**475:19-23.

[286] **Tr.**506:23-508:3.

[287] **Tr.**503:23-505:25.

[288] **Tr.**507:16-508:3.

[289] **Tr.**705:21-706:21.

[290] First Report of Growth and Development of Hass Avocado by Edwin Gutiérrez (**C-0434**).

169. This was also the conclusion of Dr. Duarte, the only Hass avocado expert in this case. His unrebutted testimony confirms Inagrosa's workers were in over their heads and made beginner's mistakes.[291]

170. Inagrosa's ability to process, store and ship avocados was equally lacking.[292] Mr. Welty admitted that Inagrosa did not have the necessary equipment or facilities for these tasks as of the Valuation Date.[293] When presented with this obstacle, Mr. Kotecha again simply assumed Inagrosa "would have had" what it needed to commercialize harvested avocados by July 2018.[294]

e. *No Financing*

171. Inagrosa had no money to operate an avocado business.

172. By the Valuation Date, Inagrosa had a few hundred dollars in cash, owed Riverside millions in unpaid loan payments and roughly US$100,000 in unpaid property taxes to Nicaragua—and it needed tens of millions of dollars to acquire basic facilities and equipment to run an avocado business, let alone to expand operations.[295]

173. Mr. Welty testified that he joined Inagrosa in 2015 to raise cash to keep the avocado project going.[296] He solicited many parties until the Valuation Date, but not one invested.[297]

174. Mr. Kotecha supposedly ignored these facts because Riverside had "pledged" US$17.5 million to the project.[298] But Mrs. de Rondón admitted that this "pledge" was worthless

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[291] Duarte I, ¶5 (**RER-01**).

[292] *See*, *e.g.*, Email from Luis Gutierrez to Carlos Rondón, July 29, 2018 (**C-0431-SPA-ENG**).

[293] **Tr.**980:6-15; Credibility II, ¶¶49,157 (**RER-04**).

[294] **Tr.**1883:18-1884:8.

[295] **Tr.**1959:20-1960:1,1963:4-25,1965:7-1967:2; Credibility II, ¶¶8-19 (**RER-04**).

[296] **Tr.**915:2-5.

[297] **Tr.**1001:23-1002:10.

because Riverside never sent any money to Inagrosa after 2014, never secured funds to support that pledge, never forgave the millions of dollars that Inagrosa owed, and had not invested "even $1 into that avocado business" by the Valuation Date.[299] Riverside was not the committed investor the Kotecha Model assumes.

2. The Forestry Business Never Existed

175. The Hearing also confirmed that Inagrosa's forestry "business" never existed. The Kotecha Model assumes Inagrosa would have logged trees at HSF's standing forest and sold the lumber to a U.S. entity for millions of dollars.[300]

176. There was never any business: Inagrosa never sold lumber to Miller Veneers (or anyone else). Tom Miller testified his company never had any commercial agreement with or had ever made any payments to Inagrosa.[301]

177. Dr. Sequeira, the only legal expert in Nicaraguan environmental law, confirmed logging was impossible because HSF was designated a private wildlife reserve.[302] Even without that designation, logging required permits and infrastructure Inagrosa did not have.[303]

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[298] **Tr.**1889:13-1892:7.

[299] **Tr.**319:4-12,320:8-13,343:3-327:19,328:1-11,329:23-330:15.

[300] Kotecha II, ¶7.5 (**CES-04**).

[301] **Tr.**454:20-456:15.

[302] **Tr.**1674:19-1675:18; Sequeira, ¶¶37.5,37.10 (**RER-05**); Mendez II, ¶39 (**RWS-17**).

[303] **Tr.**1676:3-10; Gonzalez I, ¶¶40-43,50,53 (**RWS-09**), Gonzalez II, ¶¶71-72 (**RWS-15**); Méndez I, ¶17,21-22,24,27 (**RWS-08**), Méndez II, ¶¶28-30,37 (**RWS-17**); Mena I, ¶31-33,39 (**RWS-06**).

B. Riverside Has Not Met Its Burden on the Land Value Method

178. Because the Hearing evidence exposed Riverside's Avocados-to-Riches story as fiction, Claimant abandoned the Kotecha Model by Hearing's end and focused instead on its alternative damages model: HSF's property value.[304] Mr. Kotecha assumes that HSF was destroyed by the invasion and concludes the alleged damages as of the Valuation Date were US$166,085,418.[305]

179. Claimant, however, has failed to demonstrate that HSF was destroyed. Claimant, for example, has alleged that HSF was deforested and the soil contaminated.[306] But the HSF drone video showed the forests are still there.[307] The August 14, 2018 inventory, which captured the damage caused by the invasion, also makes no mention of mass deforestation or soil contamination.[308]

180. Claimant's witnesses suggested the inventory was incomplete, but the inventory expressly provides that it covered all "existing assets" at HSF.[309] Regardless, Claimant did not submit objective evidence to show HSF suffered more harm than captured in the inventory, instead relying on Messrs. Rondón's and Luis Gutiérrez's testimony as support.[310] But Mr. Rondón testified that he was not there for the invasion and has not visited HSF since.[311] And

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[304] **Tr.**1803:15-20, 1804:2-1807:18, 1818:7-1821:6, 1922:11-1924:1, 1984:24-1986:15, 2015:2-2030:11, 2041:5-2063:9, 2066:1-2092:2; **CD-03** at 14,27,29,33.

[305] Kotecha II, ¶6.9 (**CES-04**).

[306] RFA, ¶¶124,160,162(d),274; Memorial, ¶¶18,67,195-200,275,300,387,718,743,814; Rondón I, ¶11 (**CWS-01**).

[307] Drone Video, March 7, 2024 (**R-0231**); **Tr.**574:7-579:3.

[308] Inventory of HSF, August 14, 2018 (**C-0058**).

[309] **Tr.**581:21-583:20, 733:13-737:18, 743:12-744:12.

[310] Rondón I, ¶¶89-93,96-111 (**CWS-01**); Gutiérrez I, ¶¶110-116,127-131 (**CWS-02**).

[311] **Tr.**548:20-549:6,581:17-582:2.

Luis Gutiérrez ***signed the inventory*** after having the opportunity to read it.[312] He also testified that he has not returned to HSF since then, undermining his *post-hoc* testimony that HSF suffered more harm.[313]

181. Unsurprisingly, Mr. Kotecha ignores the inventory and assumes HSF was wholly destroyed. He then offers two methodologies to determine the FMV of HSF before its "destruction."

182. *First*, he uses the "Pfister Report" to assess HSF's value.[314] But as HKA noted, this report is useless because it values avocado plantations ***in Mexico***, not Nicaragua.[315]

183. *Second*, Mr. Kotecha used listings of unsold Nicaraguan properties and utilized the highest-priced property as a benchmark to assess HSF's FMV.[316] But HKA explained this method does not represent FMV: (i) it cherry-picks the highest-priced property; (ii) there is no evidence the property at issue was sold at that price; and (iii) this method ignores objective data concerning HSF's property value, such as Inagrosa's September 2017 financial statement, which ascribes HSF a value that is ***less than one percent of the value ascribed by Mr. Kotecha***.[317] Mr. Kotecha again eschewed objectivity to assumes the best-case scenario is true, regardless of its likelihood.

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[312] **Tr.**734:16-735:23.

[313] **Tr.**715:11-15, 727:23-25, 730:10-19.

[314] Kotecha I, ¶A7.3 (**CES-01**); **CD-03** at 27.

[315] **Tr.**2015:4-21, 2018:10-24, 2019:19-2020:5, 2023:4-14; Credibility I, ¶193 n.346,348 (**RER-02**).

[316] **Tr.**1807:3-12,1898:13-1899:18,1923:4-13.

[317] **Tr.**2025:1-8,2026:3-18.

184. In contrast, HKA reviewed all data and offered alternative (and more reasonable) scenarios to assess HSF's value.[318] HKA noted these scenarios were imperfect because there is scant evidence about HSF's condition after the first and second invasions, and the fact that no one was willing to invest means even HKA's scenarios could be considered too high.[319] The only thing that is clear is there is no evidence showing that HSF suffered the damages proffered by Mr. Kotecha.

* * *

185. Finally, in response to the **Tribunal's Question 1**, Riverside claims only its direct damages under DR-CAFTA Article 10.16.1(a).[320] According to Article 10.16.4(a), "[a] claim shall be deemed submitted to arbitration under this Section when the claimant's ***notice of***…***arbitration***…referred to in paragraph 1 of Article 36 of the ICSID ***Convention is received by the Secretary-General***[.]"[321]

186. Claimant submitted its RFA on March 19, 2021. This is the critical date for invoking the Tribunal's jurisdiction, establishing the operative look-back period for purposes of the three-year statute of limitations under Article 10.18, and assessing the date of the Parties' consent to arbitration under Article 10.17.

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[318] **Tr.**2021:21-2022:8,2024:2-21.

[319] **Tr.**1978:8-1980:14,2021:6-2022:8,2024:22-2027:14; Credibility II, §§5.2-5.3 (**RER-04**). Nicaragua also submits that any awarded amounts must be offset by: (i) the hundreds of thousands of dollars Inagrosa owes in back taxes; (ii) Claimant's contributory negligence; and (iii) any sanctions issued against Inagrosa as a result of its permitting violations.

[320] Riverside voluntarily withdrew its Article 10.16(1)(b) claim on behalf of Inagrosa. *See* March 16, 2023 Letter from Riverside (**C-0472-ENG**). The Tribunal thus need not resolve the jurisdictional issues under Article 10.16.1(b). *See* Reply, ¶2098; Rejoinder, ¶476.

[321] DR-CAFTA, Art. 10.16.4(a) (**CL-0001**).

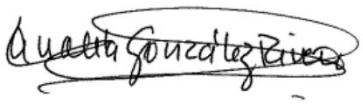
187. This date, however, is to be distinguished for determining other issues, such as *jurisdiction ratione temporis* and damages. Riverside has not demonstrated it had control of Inagrosa as of the date of the alleged breaches, relying solely on witness testimony—not a single document—that demonstrates a purported "voting block" agreement.[322] Similarly, as of the date of the breaches, Riverside owned 25.5% of Inagrosa and is not entitled to reflective losses.[323]

VI. CONCLUSION

188. For the reasons set out above, the Republic of Nicaragua should prevail on all issues before the Tribunal as set out in its Rejoinder's prayer for relief.

October 25, 2024

Respectfully submitted,



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[322] Rejoinder, ¶¶499-512.

[323] *Id*.